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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ATTORNEY GENERAL OF NEW JERSEY,
Petitioner,

vs.

ROBERT BISACCIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Petitioner.

DONALD S. COBURN,
Essex County Prosecutor,
Essex County Courts Building,
Newark, New Jersey 07102.
(201) 961-7470

STEVEN J. KAFLOWITZ,
Assistant Essex County Prosecutor,
ROBERT E. ROCHFORD,
Deputy Attorney General,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented for Review

1. Did the Third Circuit Court of Appeals, contrary to decisions of the Second and Eighth Circuits, err in finding the existence of exhaustion of state court remedies when respondent did not afford the state courts the opportunity of passing upon a federal constitutional claim of a denial of due process with respect to the admissibility of evidence and instead merely contended that he was denied a "fair trial"?

2. Whether the due process clause of the Fourteenth Amendment precludes the admission, in a state criminal trial for conspiracy, of evidence that a witness at the trial, who was available for cross-examination, and was, in fact, extensively cross-examined, previously pleaded guilty to the same conspiracy charge?

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit appears in 623 F. 2d 307 (3 Cir. 1980) and in the appendix (A1a, *et seq.*). The opinion of the District Court for the District of New Jersey will not be published and appears in the Appendix (A67a, *et seq.*). The opinion of the New Jersey Supreme Court, captioned *State* v. *Stefanelli,* appears in 78 N.J. 418, 396 A. 2d 1105

(1979) and in the Appendix (A39a, *et seq.*). The opinion of the Superior Court of New Jersey, Appellate Division, similarly captioned, appears in 153 N.J. Super. 452, 380 A. 2d 276 (App. Div. 1977) and in the Appendix (A28a, *et seq.*).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The order of the United States District Court for the District of New Jersey, dismissing respondent's petition for a writ of habeas corpus, was rendered on February 6, 1980 (A76a). On June 12, 1980, a three judge panel of the United States Court of Appeals for the Third Circuit reversed the District Court's order and ordered the cause remanded to the District Court for the limited purpose of determining whether the constitutional error found by the Circuit Court was harmless beyond a reasonable doubt (A21a). On July 10, 1980, the Court of Appeals denied petitioner's timely application for a rehearing (A77a).

Constitutional Provisions, Statutes, Court and Evidence Rules Involved

The provisions involved are lengthy and therefore their citations alone will appear at this point. Their pertinent texts are set forth in the Appendix (A85a, *et seq.*).

Constitution of the United States, Amendment XIV, Section 1.

Constitution of the United States, Amendment VI.

28 U.S.C. § 1254(1).

28 U.S.C. § 2241(a), (c)(3).

28 U.S.C. § 2254(b), (c).

Constitution of the State of New Jersey, Article 1, paragraph 10.

N.J.S.A. 2A:94-1.

N.J.S.A.2A:98-1.

N.J.S.A. 2A:119-2.

New Jersey Court Rules, R. 2:10-2.

New Jersey Court Rules, R. 3:9-2.*

New Jersey Court Rules, R. 3:22-4.

New Jersey Evidence Rules, R. 20.**

Statement of the Case

This is a petition for writ of *certiorari* to review a decision rendered by a three judge panel of the United States Court of Appeals for the Third Circuit. That court reversed an order of the United States District Court for the District of New Jersey, dismissing respondent's petition for a writ of habeas corpus, and remanded the cause to the District Court for a determination of whether a Fourteenth Amendment due process error was harmless beyond a reasonable doubt. The opinion of the court finding such error was written by the Honorable Leon Higgenbotham, Jr., Circuit Judge, and joined in by the Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania, sitting by designation. The Honorable Collins J. Seitz, Chief Judge of the Third Circuit, concurred in the court's decision on grounds not discussed in the majority opinion of the court, *i.e.*, that respondent's Sixth Amendment right to be con-

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* As in effect on April 14, 1975, the date of Joseph Cicala's guilty plea.

** As in effect in 1975, at the time of respondent's trial.

fronted with the witnesses against him was denied. Chief Judge Seitz specifically declined to pass upon whether respondent's Fourteenth Amendment due process right to a fair trial was abridged since he found a constitutional error based on a specific provision of the Constitution.

Respondent's petition for writ of habeas corpus to the federal courts evolved from a three count indictment returned on September 11, 1974, by the Grand Jury of Essex County, New Jersey. In that indictment respondent, and six others, including one Joseph Cicala,[1] were charged in count one with conspiracy to commit the crime of breaking and entering (a violation of N.J.S.A. 2A:94-1) and the crime of larceny (a violation of N.J.S.A. 2A:119-2), contrary to the provisions of N.J.S.A. 2A:98-1. Additionally, one Gerard Festa was named as an unindicted co-conspirator in that count. In counts two and three respondent and the same six others were charged with entry with intent to steal, contrary to N.J.S.A. 2A:94-1, and larceny of goods over the value of $500, contrary to N.J.S.A. 2A:119-2, respectively (A23a to 25a).

On April 14, 1975, a jury trial commenced in the Superior Court of New Jersey, Law Division, before the Honorable Ralph L. Fusco, J.S.C. At respondent's trial the prosecution's primary witness was Gerard Festa, who testified to the facts which follow: In 1972 Festa knew Nicholas Stefanelli (6T112-23 to 25),[2] Gerald Sperduto

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[1] Other than Joseph Cicala, those indicted with respondent were Nicholas Stefanelli, Gerald Sperduto, Samuel Corsaro, Nelson Tosi and John Quartuccio.

[2] 1T refers to trial court transcript of April 14, 15, 16, 1975.
2T refers to trial court transcript of April 17, 1975 (two volumes).
3T refers to trial court transcript of April 18, 1975 (two volumes).

(Footnote continued on following page)

(6T113-12 to 15), Robert Bisaccia (6T114-18 to 22), Samuel Corsaro (6T115-17 to 19), Nelson Tosi (6T116-5 to 6) and Joseph Cicala (6T116-14 to 16). Festa owned a "Chicken Delight" restaurant (6T116-20 to 25) on Mt. Prospect Avenue in Newark, New Jersey (6T117-1 to 2). Joseph Cicala was employed next door in a beauty salon (6T117-3 to 7). In June, 1972, Joseph Cicala suggested to Festa that the home of one Dominick Bruno, on Ridge Street in Newark, might be a good target for a burglary (6T118-17 to 19; 6T119-2 to 4; 6T123-13 to 15). Cicala provided Festa "scores" on previous occasions (6T119-2 to 4).

As a result of having received this information, Festa went to inspect the house with John Quartuccio (6T123-1 to 6) that same night (6T123-10). Quartuccio informed Festa that there was a burglar alarm and that they therefore would not be able to successfully burglarize the Bruno home (6T124-1 to 7). Festa had no further conversa-

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(Footnote continued from preceding page)

4T refers to trial court transcript of April 21, 1975 (two volumes).

5T refers to trial court transcript of April 22, 1975 (two volumes).

6T refers to trial court transcript of April 23, 1975 (two volumes).

7T refers to trial court transcript of April 24, 1975 (two volumes).

8T refers to trial court transcript of April 28, 29, 1975 (two volumes).

9T refers to trial court transcript of April 30, 1975.

10T refers to trial court transcript of May 1, 1975.

PT refers to trial court transcript of guilty plea hearing of Joseph Cicala of April 14, 1975.

MT refers to trial court transcript of motion hearing of May 29, 1975.

ST refers to trial court transcript of sentencing of respondent of June 3, 1975.

tions with Cicala about the house (6T125-12 to 14). Approximately one month later (6T126-16), Festa spoke to Nicholas Stefanelli and Gerald Sperduto about the Bruno house (6T126-10 to 14). Festa told Stefanelli about the burglar alarm. Stefanelli responded that the alarm would be no problem for his brother-in-law, Nelson Tosi, who could "jump the bug" (7T227-8 to 15).

A few weeks later Corsaro, Bisaccia, and Sperduto came to Festa's home on a Saturday and asked him if he knew how many children lived in the Bruno home (6T171-5 to 9).

Approximately a week and a half later, Festa was in Pennsylvania for the weekend (6T173-19 to 22). He returned home on Sunday night (6T174-14). On Monday, August 28, 1972, Festa received a call from Stefanelli to visit him (6T174-20 to 23). Festa met with Stefanelli, Bisaccia and Sperduto (6T180-13). They advised Festa that they entered the Bruno home and could not find anything (6T181-6 to 10). They told Festa that Tosi bypassed the alarm, that they searched the entire house, and called Festa several times trying to reach him (6T182-18 to 20).

Joseph Cicala, also called to the stand by the prosecution, testified that he was acquainted with Gerard Festa (3T120-13 to 16) who owned a "Chicken Delight" restaurant in Newark (3T120-22 to 23), next door to which Cicala was employed as a hairdresser (3T121-3 to 6). Cicala stated that he knew Mrs. Dominick Bruno (3T121-3 to 6) as he had done her hair on occasion (3T122-8). He noticed that she always wore expensive jewelry when she frequented the beauty parlor (3T122-11 to 13). Cicala told Festa about the jewelry and suggested to him that her home might be a good target for a burglary (3T122-22 to 24). Cicala knew that Festa was a burglar (3T123-4). He also knew where Mrs. Bruno lived since he had grown

up in her neighborhood (3T123-11 to 15). Cicala stated that he and Festa were alone at all times during their conversations regarding the Bruno home (3T128-10 to 17).

Cicala further testified that he told Festa about the house in the hope that he would receive a portion of any proceeds obtained during the burglary (3T124-7 to 9). Approximately two weeks after Cicala spoke to Festa, Festa informed Cicala that he could not commit the burglary because the house had a burglar alarm (3T124-24 to 25). The witness stated that he never received any proceeds from the break and entry of the Bruno home (3T125-16 to 18).

Toward the end of Cicala's direct examination, he explained why he was on the stand as a state's witness. Cicala testified that he had entered into a plea agreement whereby he had previously pleaded guilty to count one of the indictment then being tried, and that in exchange for his guilty plea the State would dismiss counts two and three of that indictment, as against him, and inform Cicala's sentencing judge of his "cooperation" in the case. On cross-examination it was made evident that Cicala's previously entered guilty plea to count one of indictment 75-74 was an admission that he had conspired only with Gerard Festa. This portion of Cicala's testimony, on direct and cross-examination, is lengthy, and is, therefore, set forth in the Appendix (A79a, *et seq.*).

Other State's witnesses testified as to the nature of the relationship between the Prosecutor's Office and Festa, as to the police investigation conducted concerning the breaking and entering and larceny and as to the fact that a breaking and entering and larceny did occur.

Following the submission of evidence, defense counsel and the prosecutor summed up to the jury. During his closing statement, the prosecutor briefly remarked, in response to a defense innuendo that the victim had burglarized his own home in order to recover the insurance money, that Joseph Cicala testified that he pleaded guilty to participating in the conspiracy for which respondent was on trial (8T166-12 to 21). The prosecutor's remarks in this regard read as follows:

> Bruno burglarized his own home, it never happened, and yet a young man named Joseph Cicala pleaded guilty to conspiring to break, enter and commit larceny inside the Bruno home. They said it never happened, you see. Mr. Cicala pleaded guilty to something that didn't happen.
>
> Ladies and gentlemen, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you as if you were a bunch of five year old children? [8T166-12 to 21]

The jury found respondent guilty on all three counts of the indictment. On June 3, 1975, respondent was sentenced to one to two years in the New Jersey State Prison on count one and a concurrent sentence of four to five years on count two. The sentence of four to five years imposed on count three was made consecutive to the sentences imposed on counts one and two. Respondent is currently on parole for his conviction.

On June 27, 1975, respondent filed a notice of appeal to the Superior Court of New Jersey, Appellate Division. His appeal was consolidated with that of his co-defendants Stefanelli and Corsaro.

On appeal to the Superior Court of New Jersey, Appellate Division, respondent raised the following issues:

POINT I

THE ADMISSION TO EVIDENCE OF THE TESTIMONY OF THE ALLEGED CO-CONSPIROTOR CICALA WAS ERROR

* * *

POINT II

THE ADMISSION OF TESTIMONY OF ASSISTANT PROSECUTOR FALCONE, DETECTIVE DONAHUE AND FBI AGENT WILSON, REGARDING CONVERSATIONS THEY HAD WITH THE WITNESS FESTA CONCERNING OTHER CRIMES ABOUT WHICH FESTA HAD GIVEN THEM INFORMATION VIOLATED THE HEARSAY RULE, DEFENDANTS' RIGHT TO CONFRONTATION OF WITNESSES AND DEFENDANTS' RIGHT TO A FAIR TRIAL

* * *

POINT III

ADMISSION INTO EVIDENCE OF THE GUILTY PLEA OF THE ALLEGED CO-CONSPIRATOR CICALA WAS ERROR AND THE COMMENT OF THE PROSECUTOR UPON SAME WAS ERROR

* * *

POINT IV

THE TESTIMONY OF THE ASSISTANT PROSECUTOR FALCONE REGARDING THE SENTENCE TO BE RECEIVED BY THE WITNESS IN PENNSYLVANIA WAS DELIBERATELY MISLEADING AS WAS THE SUMMATION OF THE PROSECUTOR REGARDING SAME.

* * *

POINT V

COMMENT BY THE PROSECUTOR THAT THE TESTIMONY OF SPECIAL FBI AGENT WILSON SHOULD BE BELIEVED BECAUSE OF HIS OFFICIAL POSITION WAS ERROR

* * *

POINT VI

EVIDENCE OF AN ALLEGED PHONE CONVERSATION BETWEEN FESTA'S DAUGHTER AND ONE OF THE CO-DEFENDANTS WAS HEARSAY AND THE COMMENTS BY THE PROSECUTOR THAT THE DAUGHTER COULD NOT BE CALLED AS A WITNESS BECAUSE SHE WAS IN PROTECTIVE CUSTODY WAS FALSE AND PREJUDICIAL

* * *

POINT VII

THE VARIANCE BETWEEN THE INDICTMENT AND PROOF ADDUCED AT TRIAL WAS PREJUDICIAL

* * *

POINT VIII

THE TESTIMONY OF THE ASSISTANT PROSECUTOR THAT THE WITNESS FESTA WAS IN PROTECTIVE CUSTODY MADE PRIOR TO THE WITNESS'S TAKING THE STAND WAS IMPROPER

* * *

POINT IX

THE AMOUNT OF COMULATIVE ERROR IN THE INSTANT CASE RSQUIRES REVERSAL OF THE CONVICTION

On March 28, 1977, the New Jersey Superior Court, Appellate Division, reversed respondent's conviction, finding that the guilty plea of Cicala was erroneously admitted into evidence and thus prejudiced the appellant. *State* v. *Stefanelli,* 153 N.J. Super. 452, 380 A. 2d 276 (App. Div. 1977) (A28a, *et seq*).

The State of New Jersey petitioned for certification in the New Jersey Supreme Court. That petition was granted on June 1, 1977. 75 N.J. 4, 379 A. 2d 235 (1977). The order granting the State's petition limited the matter to the "issue of the use of the testimony of Cicala as to his plea of of guilty and the prosecutor's comments thereon" (A38). In its supplemental brief to the New Jersey Supreme Court, the State made the following arguments:

POINT I

THE GUILTY PLEA OF JOSEPH CICALA WAS PROPERLY ADMITTED INTO EVIDENCE.

* * *

A. The Guilty Plea Was Properly Admitted To Show The Witness' Interest In The Matter.

* * *

B. There Was No Sixth Amendment Violation By The Admission Into Evidence Of The Guilty Plea Of The Codefendant; Any Error Was Harmless.

The respondent's brief argued the following:

POINT I

THE ENTIRE TESTIMONY OF CICALA INCLUDING HIS GUILTY PLEA WAS IMPROPERLY ADMITTED INTO EVIDENCE.

* * *

POINT II

ADMISSION INTO EVIDENCE OF THE GUILTY PLEA OF CICALA AND THE PROSECUTOR'S COMMENT GIVEN THEREON VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHTS.

On January 10, 1979, the New Jersey Supreme Court reversed the decision of the Appellate Division and reinstated the conviction. *State* v. *Stefanelli,* 78 N.J. 418, 396 A. 2d 1105 (1979). (A39a, *et seq.*). The New Jersey Supreme Court held that although the testimony of Cicala as to his guilty plea was admissible to affect his credibility, its admission without a cautionary instruction that it could not be considered as substantive evidence of respondent's guilt was error as a matter of state evidentiary law, but not reversible error since that guilty plea testimony,

given the remained or Cicala's testimony detailing his involvement with Festa in the conspiracy, added nothing of substantive consequence and thus did not have the clear capacity to produce an unjust result.

On January 24, 1979, respondent filed a petition for writ of habeas corpus in the District Court for the District of New Jersey pursuant to 28 U.S.C. §2241(a) and (c)(3). Respondent's petition sought federal habeas relief on three grounds. He claimed that the admission into evidence of Cicala's guilty plea, and the prosecutor's comment thereon in summation, denied his right to confront the witnesses against him under the Sixth Amendment and his right to a fair trial under the due process clause of the Fourteenth Amendment, and that the New Jersey Supreme Court applied an incorrect test regarding the trial court's error in admitting the testimony concerning Cicala's guilty plea. The District Court found respondent's claims to be without merit and that he had failed to exhaust his state remedies in regard to his due process claim. Accordingly, the District Court ordered the respondent's petition for writ of habeas corpus be dismissed.

Respondent subsequently presented these same arguments for habeas corpus relief to the Third Circuit Court of Appeals. As stated, that court, in an opinion authored by the Honorable Leon Higgenbotham, Jr., Circuit Judge, and joined in by the Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania, sitting by designation, found that respondent had exhausted his state remedies in regard to his due process claim and, secondly, that the substantive use made at respondent's trial of the guilty plea of his co-conspirator, Cicala, had denied respondent of his due process right to a fair trial. The opinion of the court did not reach the remaining two grounds for federal relief urged by respond-

ent. In a concurring opinion, the Honorable Collins J. Seitz, Chief Judge of the Third Circuit, found a violation of respondent's Sixth Amendment right to be confronted with the witnesses against him. Chief Judge Seitz did not pass upon either the merits of respondent's remaining contentions or whether respondent had exhausted his state remedies in regard to those remaining claims.

Petitioner now petitions this Court for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

POINT I

A claim that a state court evidentiary ruling was "unfair" does not exhaust state remedies with respect to whether that same ruling violated the Due Process Clause of the Fourteenth Amendment.

The Third Circuit Court of Appeals' ruling, that respondent's federal due process claim was exhausted as a result of his complaint in the state courts that his trial was not "fair", directly conflicts with decisions of the Second and Eighth Circuits. It effectively eviscerates the exhaustion requirement of 28 *U.S.C.* §2254(b) and (c) for any habeas petitioner arguing a due process violation, because *any* state criminal appeal is inherently an assertion that there was unfairness, to some degree, at the trial level. The unwarranted and excessive federal intervention into the state process, which must result from the decision below, deeply offends the valued concept of comity which lies at the foundation of the exhaustion-of-state-remedies doctrine. Moreover, it usurps from the state courts the

first opportunity to adjudicate and rectify federal constitutional errors committed within their own jurisdictions.

Pursuant to 28 *U.S.C.* §2254(b) and (c) a prerequisite to the granting of habeas corpus relief is a showing that state remedies have been exhausted. See, *e.g., Picard* v. *Connor,* 404 U.S. 270, 275 (1971); *Ex parte Royall,* 117 U.S. 241 (1886). As stated in *Picard* v. *Connor, supra*:

> The exhaustion-of-state remedies doctrine, now codified in the federal habeas statute, 28 *U.S.C.* §§2254 (b) and (c) reflects a policy of federal-state comity, *Fay* v. *Noia,* 372 U.S. 391, 419-420, 83 S.Ct. 822, 838-839, 9 L.Ed. 2d 837 (1963); *Bowen* v. *Johnston,* 306 U.S. 19, 27, 59 S.Ct. 442, 446, 83 L.Ed. 455 (1939), "an accommodation of our federal system designed to give the State an intial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson,* 404 U.S. 249, at 250, 92 S.Ct. 407, at 408, 30 L.Ed. 2d 418. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr* v. *Burford,* 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950) (overruled in other respects, *Fay* v. *Noia, supra,* 372 U.S., at 435-436, 83 S.Ct., at 847-848). [at 275]

Arguing the state claim in a direct criminal appeal does not constitute exhaustion of a federal claim unless the state and federal claims are identical. A claim is not exhausted unless the precise "method of analysis," on which the federal claim is based, has been tendered to the state courts. *Stanley* v. *Illinois,* 405 U.S. 645, 658 n.10 (1972); *Picard* v. *Connor, supra* at 275-278. "[I]t is not sufficient

that the federal habeas applicant has been through the state courts. The [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Picard* v. *Connor, supra* at 275-276; see also *Pitchess* v. *Davis,* 421 U.S. 482, 487 (1975). To determine whether the "same claim" or the "substantial equivalent" of the claim has been previously presented to the state courts, it is necessary to review the state court opinions and briefs and ask whether the "method of analysis" asserted in the federal courts was readily available to the state courts. *Smith* v. *Dignon,* 434 U.S. 332 (1978); *Stanley* v. *Illinois, supra; United States ex rel. Zicarelli* v. *Gray,* 543 F.2d 466, 472 (3 Cir. 1976). The requirement that the same claim be presented "is not a formal hurdle placed in the way of meritorious claims, but an essential element of federation in the administration of criminal justice" which allows the states to "set their own Constitutional houses in order before the power of the federal courts is invoked." *Fielding* v. *Lefevre,* 548 F.2d 1102, 1106 (2 Cir. 1977).

In the instant case, respondent's due process fair trial claim before the federal courts is based upon the testimony at his state trial of Joseph Ciacala. Cicala testified fully as a witness for the State regarding his own participation in the conspiracy with which he, respondent, and others were charged. That participation, in its entirety, consisted of having suggested the victim's home to Gerard Festa, a second State's witness, as a good target for a burglary (3T122-22 to 24; 3T138-22). Toward the end of his direct testimony, the witness related his plea agreement with the State, since that agreement was responsible for his having become a State's witness.[3] Cicala testified

[3] Cicala's testimony, on direct and cross, in regard to his guilty plea and plea agreement is set forth in the Appendix (A79a, *et seq.*).

that as part of that agreement he had entered a guilty plea to the first count of the indictment then being tried (3T133-20 to 21).

At the trial level respondent objected to this testimony without stating the basis for his objection (3T133-24) and did not object to the prosecutor's short reference to it in summation (8T170-14 to 15). On appeal the *only* constitutional error cited by respondent to either the New Jersey Appellate Division or Supreme Court, excepting his Sixth Amendment claim, was a "cumulative error" argument in his Appellate Division brief that the total amount of errors committed during the course of his trial, including violations of the rules of pretrial discovery and bias on the part of the trial judge, combined to deny him his "constitutional right to a fair trial." Of course, the point of New Jersey's "cumulative error" doctrine is that numerous errors may aggregate and thereby render a trial unfair, although those errors, viewed individually, are trivial or insignificant. *Biruk et al.* v. *Wilson et al.*, 50 N.J. 253, 262, 234 A.2d 225, 230-231 (1967) (and cases cited therein). As to those legal points in respondent's state court briefs which specifically concerned the admission of the guilty plea, they completely lacked *any* invocation of the Federal Constitution and rather attacked the admission of the guilty plea in terms of the substantive law of evidence. Thus, although from the removed viewpoint of the Third Circuit Court of Appeals, the admission of Cicala's guilty plea testimony was so severe an error as to be cognizable as a deprivation of due process in a federal habeas corpus proceeding, see *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974), *Milton* v. *Wainwright,* 407 U.S. 371 (1972), it went totally unnoticed as such by both respondent's trial counsel and appellate counsel.

The New Jersey Appellate Division and Supreme Court reviewed and disposed of respondent's claim concerning

Cicala's plea, excepting, again, the Sixth Amendment issue, in terms of state evidentiary law. Admittedly, the Appellate Division did not clearly state the basis for its decision. But that opinion did not explicitly refer to the Federal Constitution, and the assumption must be that the court dealt with the matter in terms of the non-consitutional arguments respondent offered. *Cf. Picard* v. *Connor, supra* at 277; *State* v. *Ingenito,* 169 N.J.Super. 524, 529, 405 A.2d 418, 420 (App.Div. 1979) (it is not the duty of the court to search the record to substantiate the argument of an appellate brief); *State* v. *Hild,* 148 N.J.Super. 294, 296, 372 A.2d 642, 643-644 (App.Div. 1977) (the parties have the burden to provide the law for the court). The New Jersey Supreme Court explicitly resolved the issue in terms of the "probative quality" of the guilty plea. *State* v. *Stefanelli, supra,* 78 N.J. at 432, 379 A.2d at 1112 (A54a). That court's conclusion was that the guilty plea of one person could not be substantively admitted against another because any such plea lacked sufficient evidential value. Importantly, it was in this context, as support for its recognition of the non-probative considerations which often prompt pleas, and not, as asserted by the instant Third Circuit opinion, *Bisaccia* v. *Attorney General of New Jersey,* 623 F. 2d 307, 311 (3 Cir. 1980) (A8a-9a), in pursuit of a Fourteenth Amendment due process determination, that the state Supreme Court quoted and relied upon *United States* v. *Toner,* 173 F. 2d 140 (3 Cir. 1949).

The conclusion by the Third Circuit that respondent exhausted his state remedies issues from a strained and selective reading of the state court opinions. It represents a lax and vitiating attitude toward the exhaustion doctrine, in direct conflict with decisions of this Court, see *Stone* v. *Powell,* 428 U.S. 465 (1976), whereby the mere recitation by the state courts of such phrases as "denied a fair trial," *Bisaccia* v. *Attorney General of New Jersey, supra* at 310

(A8a), and "prejudice which had to affect the outcome of the trial," *id.* (A8a), is equated with a federal constitutional ratiocination; moreover, an analysis "*consistent* with Fourteenth Amendment due process determination," *id.* (emphasis supplied; A8a) is accepted in satisfaction of the exhaustion requirement that the claim raised in the federal courts be the same claim raised in and confronted by the state courts. *Picard* v. *Connor, supra* at 275-276; see also *Pitchess* v. *Davis, supra* at 487 (1975).

The Third Circuit opinion fails to acknowledge the existence of a state constitutional right to a fair trial, *N.J. Constitution,* Art. 1, para. 10, *State* v. *DiPaglia,* 64 N.J. 288, 305, 315 A. 2d 385, 395 (1974) (Clifford, J., dissenting), as well as a well developed state common law fairness standard for the administration of criminal justice. See, *e.g.,* N.J. Ct. R. 3:22-4(b) and (c) (ground for relief not raised in prior proceeding is barred in post-conviction proceeding unless enforcement of bar would result in "fundamental injustice; or * * * would be contrary to the Constitution of the United States or the State New Jersey"); *State* v. *Gregory,* 66 N.J. 510, 517, 333 A.2d 257, 261 (1975) (separate trials for multiple offenses arising out of the same conduct will be barred, not based upon state or federal constitutional principles, but because of considerations of "fairness" and the "fulfillment of reasonable expectations in the light of constitutional common law goals"); *State* v. *Kunz,* 55 N.J. 128, 259 A. 2d 895 (1969) (presentence reports will be disclosed to defendants, not as a matter of state or federal constitutional compulsion, but as a matter of rudimentary fairness).

The position taken by the Third Circuit is in direct conflict with that of the Second and Eighth Circuits. In *Johnson* v. *Metz,* 609 F. 2d 1052 (2 Cir. 1979), the appellees sought habeas corpus relief on the grounds that

the state judge had excessively intervened into their trial and had thus deprived them of their right to a fair trial under the due process clause of the Fourteenth Amendment. At the state level appellees had argued that they "were deprived of a fair and impartial trial by the prejudicial conduct and constant interference of the trial court." *Id.* at 1054. An examination by the Second Circuit of the state briefs in support of that claim revealed, as in the case at bar, that the primary line of cases relied upon were state cases which had dealt with the issue in terms of state law, and that federal cases were cited without reference to constitutional provisions. Also, at the conclusion of the state appellate brief of appellee Johnson, it was urged that "'a fair trial is one of the most basic and fundamental essentials of judicial process and *no matter how strong the evidence pointing to guilt may be,* a judgment of conviction must be reversed if the trial was not fair'" (emphasis in original). *Id.* The Second Circuit, properly emphasizing "the importance of according to the state courts co-equal jurisdiction and competence to decide constitutional questions," *id.*, concluded that there had been no exhaustion of available state remedies because the state courts had "never had a reasonable opportunity to consider the conduct of the trial judge as deficient on *federal constitutional* grounds" (emphasis in original). *Id.* at 1053-1054. Further, in *Gayle* v. *LeFevre,* 613 F. 2d 21 (2 Cir. 1980), the Second Circuit confirmed its holding in *Johnson* v. *Metz, supra.* In *LeFevre* the habeas petitioner-appellant first invoked the Federal Constitution, in support of his claim that he had been denied a fair trial, before the federal courts. The Second Circuit took note that:

> a passing comment in appellant's brief submitted to the Appellate Division to the 'unconstitutionally

> conducted interrogation,' [apparently regarding a Fifth Amendment claim] was the only explicit reference by appellant concerning his *constitutional* rights in the entire forty-one page submission. [emphasis in original; *Id.* at 22, n.2]

The court, iterating the stance it took in *Metz,* held that the federal constitutional issues raised before it had not been presented to the state courts for appellate review and therefore the exhaustion requirement of 28 U.S.C. §2254(b) and (c) had not been met.

In *Thomas* v. *Wyrick,* 622 F.2d 411 (8 Cir. 1980), the habeas petitioner claimed that the state trial court's exclusion of his character witnesses violated the Fourteenth Amendment to the Federal Constitution. At the state level, petitioner argued in his brief to the State Court of Appeals of Missouri, "that the failure of the trial court to allow Thomas to call character witnesses was an abuse of discretion and 'denied a fair trial.'" *Id.* at 412. The Eighth Circuit, relying upon *Picard* v. *Connor, supra,* held that although Thomas presented to the state courts all of the facts underlying the federal claim, his reference in his brief to a fair trial, without supporting citations to any federal cases or the Federal Constitution, did not give the state courts a fair opportunity to consider Thomas' federal claim.

The above cases make it evident that, had respondent filed his petition in either the Second or Eighth Circuits, instead of the Third, his due process claim would have been dismissed on exhaustion grounds. It is thus submitted that there now exists a direct conflict between the Second and Eighth Circuits and the Third Circuit regarding the proper functioning of the exhaustion doctrine. That conflict can only be effectively resolved through review by this Court of the doctrine under the circumstances presented in the instant matter.

It is additionally submitted that the instant controversy will constantly resurface in future habeas petitions emanating from New Jersey. New Jersey appellate procedure necessitates that appellants couch their arguments in "fairness" terms, regardless of the legal theory upon which they choose to proceed. N.J. Ct. R. 2:10-2 states that:

> Any error or omission shall be disregarded by the apppellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

In *State* v. *Macon,* 57 N.J. 325, 338, 273 A. 2d 1, 8 (1971), the seminal case in New Jersey on the question of what constitutes reversible error, the Supreme Court stated that, whether error was plain or not, "the question for the appellate court was simply whether in all the circumstances there was a reasonable doubt as to whether the error denied a *fair trial* and a *fair decision* on the merits" (emphasis supplied). Given these standards for appellate review of trial errors in New Jersey, it is manifest that the Third Circuit opinion in this case effectively eliminates the exhaustion requirement for any habeas petitioner from New Jersey who claims that his Fourteenth Amendment due process right to a fair trial was abridged. As observed above, few such petitioners would not have spoken to the state courts in "fairness" terms, solely in order to comply with state appellate procedure, and *not* to give those courts an opportunity to consider federal constitutional issues, no matter what were the bases of their state appeals.

Thus, the instant Third Circuit opinion, in addition to conflicting with the pronouncements of two other federal circuits, sets up a clear antagonism between the state and federal courts. The federal intrusion into the state pro-

cess mandated by the decision below deprives the state courts of the first opportunity to adjudicate federal issues arising out of their own proceedings; it also precludes those courts from applying the harmless constitutional error standard of *Chapman* v. *California,* 386 U.S. 18 (1967) and *Fahy* v. *Connecticut,* 375 U.S. 85 (1963), and from fashioning appropriate remedies for transgressions of the Federal Constitution determined to have been committed within their jurisdictions. It need hardly be said that the result must be an exacerbation of federal-state relations and a dissolution of the constitutional balance upon which the doctrine of federalism is founded. See *Zicarelli* v. *Gray, supra* at 472.

POINT II

The Due Process Clause does not preclude the admissibility of an alleged co-conspirator's guilty plea to affect the credibility of that co-conspirator as a witness in a State criminal proceeding.

The issue presented in the instant case involves the use at a state criminal trial for conspiracy of a prosecution witness' prior guilty plea to the same conspiracy charge. The Supreme Court of New Jersey held that evidence of such a guilty plea when adduced by the prosecution was inadmissible as substantive proof of the existence of the conspiracy as a matter of state evidence law. However, the New Jersey Supreme Court also held in this case that such evidence *was* admissible to affect the credibility of the declarant who was a witness at the hearing. *State* v. *Stefanelli, supra,* 78 N.J. at 430-434, 396 A.2d at 1110-1113 (A49a to 55a).[4] This holding was based on the conclusion

[4] The Supreme Court of New Jersey explicitly held that the "guilty plea was definitely admissible to affect [the declarant's] credibility as a witness." *State* v. *Stefanelli, supra,* 78 N. J. .at 433, 396 A. 2d at 1112 (53a).

of the Supreme Court of New Jersey that a State evidence rule, N.J. Evid. R. 20, permitted the use of a prior guilty plea to affect the credibility of a witness. The Court of Appeals held that the due process clause of the Fourteenth Amendment precluded the admission of such evidence because of its potential to "prejudice" the jury. Petitioner submits that the Court of Appeals decision is incorrect as a matter of law and that it constitutes a gross intrusion on the independence of the states to create and enforce rules governing tne admissibility of evidence in criminal trials.

The salient facts are undisputed. As more fully set forth in petitioner's statement of the case the prosecution in this case alleged that respondent was a participant in a conspiracy to commit a burglary. The prosecution claimed that the conspiracy was hatched in a conversation between Joseph Cicala and Gerard Festa in which Cicala identified a certain residence as an appropriate target for a burglary. That residence was indeed subsequently burglarized.

At trial, the State of New Jersey presented Joseph Cicala as a witness. He testified to his role as the individual who identified the target of the burglary to Festa. Cicala, who was also charged with the same crimes as respondent, entered a bargained guilty plea to the conspiracy charge, prior to the inception of respondent's trial. In the course of Cicala's direct examination, the prosecution adduced from Cicala testimony that Cicala previously pleaded guilty to the same conspiracy charge on which respondent was being tried. Respondent's counsel objected to the admission of proof of Cicala's guilty plea. That objection was overruled by the state trial court. Cicala testified as to

his motivations for pleading guilty, the consideration[5] tendered to him by the prosecution for his guilty plea and his agreement to testify for the prosecution against respondent.

Respondent was convicted of criminal conspiracy, breaking and entering with intent to steal and larceny. On his state appeal, he challenged the admissibility of Cicala's testimony that Cicala pleaded guilty to the conspiracy charge. The New Jersey Supreme Court held that the evidence of the guilty plea was "definitely" admissible to affect Cicala's credibility as a witness because such evidence went directly to his "credibility" and, since it involved his motivation in testifying, also tended to establish Cicala's "interest" or bias in the proceeding. *State* v. *Stefanelli, supra,* 78 N.J. at 433-434, 396 A.2d at 1112-1113 (A53a-54a).

Respondent sought federal habeas corpus relief on the ground that the prosecution's use of Cicala's guilty plea violated the due process clause of the Fourteenth Amendment. The Court of Appeals upheld this claim on the theory that proof of a conspirator's prior guilty plea always violated the due process clause. The decision of the Court of Appeals was grounded on *United States* v. *Toner, supra.* That case involved the reversal of a federal criminal conviction in circumstances very similar to those presented in respondent's trial. The result in *Toner* arose from an application of federal evidentiary law principles. In this case, the Court of Appeals held that the federal rule of evidence in the Third Circuit was binding on the states because due process required the same result. The kernel

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[5] That consideration involved the dismissal of two counts of the indictment against Cicala as well as an agreement that Cicala's "cooperation" with the prosecution be deemed a relevant factor when Cicala was sentenced on the conspiracy charge to which he pleaded guilty.

of the opinion below is that proof of a witness' guilty plea to a conspiracy is always "fundamentally unfair" in a prosecution for that same conspiracy.

Petitioner submits that the instant case represents the logical analogue to *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). In that case this Court held that "traditional and fundamental standards of due process" *required* that a state permit a defendant in a criminal prosecution the opportunity to offer in evidence prior sworn statements of a witness at the trial where those statements both exculpated the defendant and strongly inculpated the witness. This Court ruled that state evidence rules of *exclusion* could not be applied for two reasons. First, the statement was highly reliable in that it was under oath and "was in a very real sense self-incriminating." *Chambers* v. *Mississippi, supra,* at 300-301. Secondly, the declarant was available for cross-examination under oath at the trial so that the trier of fact could observe the declarant's demeanor and weigh his responses. *Id.* at 301. Moreover, even while *requiring* the admissibility of the evidence in *Chambers,* this Court stressed that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.* at 302-303.

Chambers is itself consistent with the prior precedent of this Court involving the application of the due process clause to determine the validity of state evidence rules. Except in those cases involving a specific constitutional guarantee, such as self-incrimination, *cf. Griffin* v. *California,* 380 U.S. 609 (1965), this Court has generally employed the due process clause only to *require* the admission of probative evidence. See, *e.g., Chambers* v. *Mississippi, supra; Brooks* v. *Tennessee,* 400 U.S. 605, 612-613 (1972). The general policy of this Court has been to pro-

mote the free admission of evidence because, "the truth is more likely to be arrived at by hearing all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury." *Washington* v. *Texas,* 388 U.S. 14, 22 (1967), quoting *Rosen* v. *United States,* 245 U.S. 467, 471 (1918). See also *Trammel* v. *United States,* —— U.S. ——, 100 S.Ct. 906 (1980). The decision of the Court of Appeals is absolutely inconsistent with this policy. There is no dispute, including in the opinion of the Court of Appeals, that Cicala's guilty plea was probative on the issue of his credibility as a witness and the credibility of his testimony. Nothing in the prior decisions of the Court or in the Constitution can possibly require exclusion of that probative evidence.

In addition, petitioner believes that the decision of the Court of Appeals is particularly suspect because a *specific* constitutional provision governing the admission of evidence, namely the confrontation clause of the Sixth Amendment, would not operate to exclude proof of Cicala's prior guilty plea. This Court has established that admission of the prior statements of a witness at a trial will not violate the right to confrontation as long as the witness is available for cross-examination. See *Ohio* v. *Roberts,* —— U.S. ——, 100 S.Ct. 2531 (1980); *Nelson* v. *O'Neill,* 402 U.S. 622 (1971); *California* v. *Green,* 399 U.S. 149 (1970). Since Cicala was available as a witness at trial, and was actually cross-examined as to his guilty plea by defense counsel, the core policy of the confrontation clause was satisfied. Petitioner believes that the same consideration, namely the ability to cross-examine, also precludes a finding that due process was denied respondent at trial.

The constitutionally mandated exclusion of proof of Cicala's guilty plea could only be justified if this evidence was so utterly lacking in probative force that it was outweighed by its potential for prejudice and therefore its admission thwarted the fundamental guarantee of a fair trial. No such conclusion could possibly be drawn with respect to Cicala's guilty plea. That plea was entered in open court and in the presence of respondent's counsel (3T134-13 to 15). It was placed on the record and that transcript was available for use by respondent's counsel in cross-examining Cicala. The guilty plea, in accordance with New Jersey law,[6] was supported by a "factual basis" derived from Cicala's own statements which established all of the elements of the crime to which he was admitting guilt.[7] In addition, the plea was a declaration against penal interest. Indeed, as an admission of guilt upon which punishment could, without more, be based, Cicala's plea represented the ultimate declaration against penal interest. This Court has recognized that the tendency of a declaration to be against penal interest is a factor which imparts a high degree of probative value to the contents of the declaration. See *Chambers* v. *Mississippi, supra,* at 300-301; *Dutton* v. *Evans,* 400 U.S. 74 (1970).

The circumstances under which Cicala pleaded guilty and under which he testified do not demonstrate, or even sug-

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[6] N.J. Ct. R. 3:9-2; see, *e.g., State* v. *Taylor,* 80 N. J. 353, 361-362, 403 A. 2d 889, 894 (1979).

[7] This requirement of a factual basis obviates the possibility that the guilty plea might be based upon considerations extraneous to guilt or innocence, for example, the dismissal of unrelated criminal charges. Of course, cross-examination at trial is another mechanism which allowed respondent's counsel an opportunity to plumb Cicala's motives for pleading guilty.

gest, that his guilty plea was so inherently unreliable that its probative value was outweighed by its potential to mislead the jury. That plea simply represented a capsulized reiteration of the identical evidence, highly damaging to respondent, that Cicala was uttering in the form of his live testimony as to his knowledge of the formation of the criminal conspiracy.

Petitioner submits that the Court of Appeals has improperly transformed a federal evidentiary principle into an iron rule of constitutional law. The due process clause does not create any such authority in the national judiciary. The creation and enforcement of state evidence codes is a matter within the peculiar competence of the states and goes to the very heart of those police powers reserved to the states by the Tenth Amendment. This Court should, by granting the instant petition for a writ of *certiorari,* act to correct the flagrant infringement on state court independence committed by the Court of Appeals below. Without such corrective action by this Court, the ability of the states to experiment with and develop a healthy diversity in their approach to evidentiary principles would be severely impaired. Federal rules of evidence must not become a straitjacket on state trial courts.

CONCLUSION

For the reasons stated above, Petitioner, the Attorney General of New Jersey, respectfully requests that this Court grant the Petition for Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
By: DONALD S. COBURN,
Essex County Prosecutor,
Attorney for Petitioner.

STEVEN J. KAFLOWITZ,
Assistant Essex County Prosecutor,
ROBERT E. ROCHFORD,
Deputy Attorney General,
On the Petition.

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit, Dated June 12, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2040

BISÁCCIA, ROBERT, *Appellant*

v.

THE ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civ. No. 79-0301)

Argued March 17, 1980

Appendix A

Before: SEITZ, *Chief Judge,* HIGGINBOTHAM, *Circuit Judge* and SIMMONS, *District Judge**

(Opinion filed June 12, 1980)

ALLEN C. MARRA (Argued)
356 Millburn Avenue
Millburn, New Jersey 07041
Attorney for Appellant

JOHN J. DEGNAN
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

DONALD S. COBURN
Prosecutor, Essex County

STEVEN J. KAFLOWITZ (Argued)
Assistant Prosecutor, Essex County
Essex County Courts Building
Newark, New Jersey 07102
Attorneys for Appellee

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*

This is an appeal from a denial of a petition for a writ of habeas corpus. The district court held that the

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* Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania, sitting by designation.

appellant had failed to satisfy the "exhaustion of state remedies" requirement of 28 U.S.C. §2254(b) and had failed to demonstrate a constitutional violation as required by 28 U.S.C. §2254(a). We disagree with both of these conclusions and therefore will reverse.

I.

The appellant, Robert Bisaccia, was convicted in a New Jersey state court along with three co-defendants of conspiracy, entering with intent to steal, and larceny of goods of value in excess of $500. During the trial, the prosecution presented the testimony of a co-conspirator, Joseph Cicala, who testified about his own plea of guilty to a charge arising out of the alleged conspiracy. Over defense counsel objections, the trial judge permitted the introduction of this testimony as to the guilty plea without requiring the prosecutor to explain its purpose and without cautioning the jury that evidence of this nature could not be used as substantive proof of the existence of a conspiracy. In his summation, the prosecutor additionally sought to impress the jury with the significance of the guilty plea by stating:

> [A] young man named Joseph Cicala *pleaded guilty* to conspiring to break, enter and commit larceny inside the Bruno home. They [the defendants] said it never happened, you see. Mr. Cicala *pleaded guilty* to something that didn't happen.
>
> Ladies and gentlemen, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you as if you were a bunch of five year old children?

Appendix A

Quoted in State v. *Stefanelli,* 153 N.J. Super. 452, 458 (1977) (emphasis added). Bisaccia appealed his conviction, along with his co-defendants, to the Appellate Division of the New Jersey Superior Court. In his brief, Bisaccia alleged numerous grounds for reversal, among them the introduction of the Cicala guilty plea without limiting instruction and the prosecutor's subsequent comments. He argued that the cumulative effect of these errors impermissibly prejudiced his case:

> An accused is not entitled to a trial perfectly free from all error, but he is entitled as a *constitutional* right to a fair trial and it is respectfully urged that the manner in which the court below conducted this hearing did not begin to render the defendants a fair trial.

Brief to the New Jersey Superior Court, Appellate Division at 37, *reprinted in* App., at 44a (emphasis added) (hereafter Appellate Division Brief).

The Appellate Division agreed with the appellant's attack on the unrestricted admission of the guilty plea, finding that "[i]t is fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy." 153 N.J. Super. at 459. On the basis of the "prejudicial error inherent in the admission of such testimony," the Appellate Division concluded that the trial court " 'deprived the defendant of a very substantial protection to which he was entitled.' " *Id.* at 459, *quoting United States* v. *Toner,* 173 F.2d 140, 142 (3d Cir. 1949).

The New Jersey Supreme Court then granted certification on the issue of the guilty plea testimony. The court

addressed the appellant's constitutional argument in terms of the Sixth Amendment confrontation right and, because of the availability of cross-examination, found no violation. While finding that the trial court erred in failing to issue cautionary instructions to the jury regarding the testimony, the court held nevertheless that the error "did not have a clear capacity to produce an unjust result" and was harmless. *State* v. *Stefanelli*, 78 N.J. 418, 437 (1979). The question of harmless error was answered in terms of New Jersey evidentiary law. Bisaccia's conviction was reinstated. His habeas corpus petition to the district court was denied and this appeal followed. The district court based its denial of the habeas corpus petition on the grounds that the appellant failed to exhaust his remedies in the state court system and that the error alleged did not violate the United States Constitution. We disagree.

II.

The requirement, embodied in 28 U.S.C. §2254(b), that state remedies must be completely exhausted before federal courts will grant habeas corpus reief is well setted.[1]

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[1] The relevant statutory provisions are 28 U.S.C. §2254(a) & (b) and provide as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(Footnote continued on following page)

Ex Parte Royall, 117 U.S. 241, 253 (1886). The United States Supreme Court has more recently articulated a standard for determining what constitutes sufficient exhaustion. In *Fay* v. *Noia,* 372 U.S. 391, 428 (1963), the Supreme Court held that a "federal claim must be fairly presented to state courts." In determining what constitutes a fair presentation, the Supreme Court has required that the claim presented to the state court be the "substantial equivalent" of the claim asserted in a federal habeas corpus petition. *Picard* v. *Connor,* 404 U.S. 270, 278 (1971). The Court in *Picard* carefully noted that "[w]e do not imply that respondent could have raised the [constitutional] claim only by citing 'book and verse on the federal constitution'. . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." *Id.* A determination of whether the substance of the appellant's claim was advanced in the state proceedings requires "a searching scrutiny by the federal habeas court of the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal habeas courts." *Zicarelli* v. *Gray,* 543 F.2d 466, 472 (3d Cir. 1976) (en banc).

(Footnote continued from preceding page)

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Appendix A

The district court found Bisaccia's presentation of issues to the New Jersey courts dissimilar to those presented in his petition for federal habeas corpus. It held that he failed to present his constitutional arguments to the state courts and thus the state courts did not have a fair opporunity to consider the constitutional implications of the trial court's error. The district court opinion notes that the only "constitutional" reference made by appellant before the New Jersey courts was the "cryptic" argument that "he is entitled as a constitutional right to a fair trial." Appellate Division Brief, App., at 44a. The appellee further points out that not even the *federal* constitution was specified by the appellant. Moreover, it is suggested that this vague reference addressed not only the issue of the use of the guilty plea but also the alleged bias of the trial judge and the violation of the rules of pretrial discovery. In support of its contention that the appellant's claim was not fairly presented, the appellee relies on *Wilson* v. *Fogg,* 571 F.2d 91, 94 (2d Cir. 1978), which held that the failure to raise a constitutional violation altogether, but with a citation to cases addressing a particular issue in constitutional terms, "hardly amounts to providing the state courts with the 'fair opportunity' to weigh the constitutional claim required by *Picard*. . . ." Alhough these arguments are not totally without merit, we nevertheless conclude that the appellant's broadly alleged constitutional argument, together with the repeated assertion that he was denied a fair trial, is enough to satisfy the exhaustion requirement. In *Zicarelli* v. *Gray,* this court noted that in order to determine whether the "same claim" or the "subsequent equivalent" of the claim has been previously presented to the state courts, it is necessary to ask whether the "method of analysis" asserted in the federal courts was readily available to the state court. 543 F.2d at 472.

Appendix A

In reversing the appellant's conviction, the Appellate Division, relying on *United States* v. *Toner*, 173 F.2d 140 (3d Cir. 1949), explicitly concluded that Bisaccia's trial was so wrought with unfairness as to require setting aside the verdict of the jury. "Because of the error . . . relating to the testimony of Cicala with respect to his guilty plea to the conspiracy charge, we find defendants to have been prejudiced to the extent that they were denied a fair trial." 153 N.J. Super. at 460. While the Appellate Division did not cite to the Fourteenth Amendment in its reversal, its "method of analysis" was consistent and synonymous with the classic findings required for Fourteenth Amendment due process violations:

> It is fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy. After all, an individual would not plead guilty to a conspiracy that did not exist. *We believe even the inference to be drawn from this testimony created prejudice which had to affect the outcome of the trial.* In addition, no limiting instruction was given by the trial judge so that the jurors were permitted to use Cicala's testimony as they pleased.

153 N.J. Super. at 459 (emphasis added).

Although the New Jersey Supreme Court majority apparently believed there to be no such unfairness, it nevertheless pursued a method of analysis consistent with Fourteenth Amendment due process determinations:

> [A] guilty plea of one person as such cannot be considered satisfactory or worthy evidence of the guilt of others even though similarly circumstanced and

> is properly excludable under the axiom that a defendant on trial is entitled "to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *United States* v. *Toner, supra* at 142; *Babb* v. *United States, supra* at 542. Hence we conclude, as did the court below, that Cicala's guilty plea was inadmissible as substantive evidence of the guilt of the defendants.

78 N.J. at 433. Although it followed this analysis, the court concluded that "the error did not have the clear capacity to produce an unjust result and that it had a minimal effect on the outcome of the trial." *Id.* at 437. The dissent by Justice Pashman unequivocally states that the evidentiary admission violated fundamental fairness:

> It is *patently unfair* to subject a defendant to criminal sanctions merely because his alleged co-conspirator has not elected to stand trial. In effect, the guilty plea evidence cannot be introduced because its relevance is far outweighed by its potential prejudicial impact upon the jurors' deliberations.

Id. at 441 (emphasis added). Justice Pashman's statement that the trial was "patently unfair" is a description similar to the traditional characterizations used to assess purported Fourteenth Amendment due process violations. As Justice Frankfurter stated:

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

Rochin v. *California,* 342 U.S. 165, 173 (1952). A trial which is "patently unfair" surely offends the "sense of justice" that Justice Frankfurter described as an element of due process.[2]

Particularly in view of Justice Pashman's finding that the admission of the evidence was "patently unfair," thereby casting his dissent in constitutional language, this is not a case, as with *Wilson* or *Picard*, where the state courts had no indication of constitutional infirmity Nor does *Zicarelli* undercut the appellant's position. In that case, a state prisoner alleged that his constitutional rights were violated when he was tried by a jury selected from residents of a county other than the one in which the alleged crimes were committed and that he was denied his right to trial by a jury comprising a representative cross-section of the locale where the crimes took place. This court concluded that the defendant had failed to exhaust his state remedies by merely transmitting a letter to the New Jersey Supreme Court highlighting a California case which discussed the cross-section issue and by making further reference to the decision at oral argument. Although Zicarelli's state court briefs addressed the venue issue, they ignored the cross-section claim. Thus, Judge Adams, writing for the court, concluded that "[s]uch an arrangement hardly seems to conform to the Supreme Court criteria of 'fairly presenting' an issue. Nor does it appear to satisfy

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[2] As the late Chief Justice Warren wrote in dissent in *Spencer* v. *State of Texas,* 385 U.S. 554, 570 (1967):

> [T]he criteria for decision in procedural due process cases are necessarily drawn from the traditional jurisprudential attitudes of our legal system rather than from a relatively specific constitutional command.

the comity rationale that undergirds the exhaustion rule." 543 F.2d at 474-75.

Because the substance of the appellant's state claim is virtually indistinguishable from the due process allegation now before the federal court, and because the method of analysis is indistinct, the *Picard* test for exhaustion of state remedies has been met. This conclusion is especially appropriate because of the necessarily vague nature of a due process allegation. Failure to invoke the Due Process Clause more specifically should not therefore stand in the appellant's path to habeas relief, especially since the state courts understood and considered the "substantial equivalent" of the appellant's claims before this court and the court below.

III.

It is a well-established principle that evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial. *Donnelly* v. *De Christoforo,* 416 U.S. 637, 642-43 (1974); *United States ex rel. Perry* v. *Mulligan,* 544 F.2d 674, 678 (3d Cir. 1976), *cert. denied,* 430 U.S. 972 (1977). We next consider whether use of the co-conspirator's guilty plea rises to the level of constitutional proportions. If so, the appellant will have satisfied the requirements of 28 U.S.C. §2254(a).

It is well settled in this circuit that use of a co-conspirator's guilty plea as substantive proof of a defendant's complicity in a conspiracy without cautionary in-

struction is not admissible as evidence. *United States* v. *Toner*, 173 F.2d 140, 142 (3d Cir. 1949). However, as the district court noted, the cases address this issue in evidentiary rather than constitutional terms. Indeed, the appellee urges that the error merely amounted to "evidentiary irrelevance." We nonetheless disagree. The use of such evidence is sufficiently unfair so as to raise the spectre of unconstitutionality for purposes of habeas corpus relief. We ground this conclusion on the concept of fundamental fairness inherently required in every criminal trial. Judge Goodrich's eloquent statement in *United States* v. *Toner* is our starting point:

> From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. There are many such instances in the law. See 4 Wigmore, Evidence §1171 *et seq.* (3d Ed. 1940).
>
> The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant had a right to have his guilt or innocence deter-

> mined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. We think that the charge given upon this point was contrary to that rule and inadvertently, of course, deprived the defendant of a very substantial protection to which he was entitled.

173 F.2d at 142. (footnotes omitted). Judge Goodrich's rationale in *Toner* is bottomed as much on concepts of constitutional fairness as on concepts of "evidentiary" fairness. For the underlying purpose ultimately is to assure a criminal defendant that his guilt or innocence will be "determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Id.* The inherent unfairness and likely prejudice of such evidence in this case challenges our concept of due process. The Seventh Circuit, in addressing the practice of introducing evidence of other, related crimes, has noted:

> When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice of the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law.

United States ex rel. Bibbs v. *Twomey,* 506 F.2d 1220, 1223 (7th Cir. 1974), *quoting United States ex rel. Durso* v. *Pate,* 426 F.2d 1083, 1086 (7th Cir. 1970). Under the circumstances here, the admission of the co-defendant's guilty plea, the failure of the trial judge to give cautionary instructions to the jury about this evidence and

the prosecutor's comments on this evidence so exceeded the tolerable level of ordinary trial error as to amount to a denial of constitutional due process. As such, we hold that the appellant has satisfied the requirement of 28 U.S.C. §2254(a).

IV.

Since the appellant has exhausted all available remedies and since the error in this case may be viewed as a violation of the appellant's Fourteenth Amendment due process right, this case must be remanded for a determination of whether it was harmless error. In order for constitutional error to be found harmless, it must be "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24 (1967). The relevant question then is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87 (1963).

Applying the *Chapman-Fahy* test to the facts in this case, a district court might well conclude that use of the Cicala guilty plea as substantive evidence of Bisaccia's guilt without limiting instructions to the jury, coupled with inflammatory prosecutorial remarks, might have contributed in some meaningful sense to the conviction. The district court found that even if the appellant had exhausted his state remedies, he failed "to demonstrate a constitutional violation by the trial court." Because we concluded above that a constitutional violation was demonstrated, the question remains whether under *Chapman* the error here was harmless. The case will be remanded for the limited purpose of making a finding on this latter issue.

Appendix A

V.

For the foregoing reasons, the order of the district court dismissing the appellant's petition for a writ of habeas corpus will be reversed and remanded.

SEITZ, *Chief Judge*, concurring.

I agree with the majority that appellant's rights under the federal Constitution were denied when the state used a co-conspirator's guilty plea as evidence of his guilt. Therefore, I concur in the decision to reverse the order of the district court and to remand for application of the harmless error standard of *Chapman* v. *California*, 386 U.S. 18, 24 (1967). I write separately because I believe that appellant was denied his sixth amendment right to be confronted with the witnesses against him. I would avoid invoking the due process standard of fundamental fairness.

The Supreme Court applied the confrontation clause to restrict a prosecutor's use of third-party convictions and guilty pleas in *Kirby* v. *United States*, 174 U.S. 47 (1899). In a prosecution for receipt of property stolen from the United States, the government's proof of the fact of theft from the United States consisted of guilty pleas of three of the thieves and the conviction after trial of a fourth. The Court reversed the receiver's conviction, holding that he had not been "within the mean-

ing of the Constitution confronted with the witnesses against him." *Id.* at 60.[1]

It is important to note that the confrontation clause violation in *Kirby* did not result from the government's failure to confront the defendant with the persons who had pled guilty or had been convicted. The Court saw the effect of the government's use of third-party conviction records and guilty pleas as allowing the government to use its witnesses to prove facts incriminating to a defendant while not allowing the defendant an opportunity to challenge, impeach, and cross-examine those witnesses. In the absence of a restriction, the Court reasoned that the government might use its witnesses to establish facts necessary to convict a third person, either by presenting the witnesses at trial or by inducing a guilty plea, and might then offer the third person's conviction in its prosecution of the defendant as proof of the facts essential to sustain the earlier conviction. *Cf.* Fed. R. Evid. 803 (22) (final judgment of conviction entered after trial or guilty plea ad-

[1] The statute at issue in *Kirby* provided that the conviction of the principal felons for theft of property from the United States was conclusive proof of the fact of theft in a subsequent prosecution of a receiver of the property. Act of March 3, 1875, ch. 144, §2, 18 Stat. 479 (1879). The district court instructed the jury differently, charging them that the guilty pleas and conviction constituted *prima facie* proof. *See* 174 U.S. at 50-51. The Supreme Court ruled that both the statutory standard of conclusive proof and the district court's modification violated the confrontation clause: "The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felons as competent proof for any purpose." *Id.* at 60.

missible to prove facts essential to conviction).[2] At no point in this process would the government confront the defendant with the witnesses that it assembled in its prosecution of the third person. *See generally Kirby,* 174 U.S. at 55.

In appellant's trial the state attempted to prove the existence of a conspiracy involving appellant by introducing a co-conspirator's guilty plea. In so doing, the state violated appellant's rights under the confrontation clause, as construed in *Kirby.* The error was not avoided by the opportunity that appellant had to cross-examine the co-conspirator at trial. In *Kirby,* the Court addressed a defendant's right to confront not the third person who pleaded guilty but the witnesses that the government would have presented in a trial of the third person. We can have no assurance that appellant had an opportunity to confront those witnesess at his trial.

In this sense, confrontation in the circumstances of *Kirby* differs from the confrontation in the circumstances of *Bruton* v. *United States,* 391 U.S. 123 (1968). In *Bruton* the Court prohibited the use of a co-defendant's confession in a joint trial. There the Court addressed the right of a defendant to confront and cross-examine his confessing codefendant, a right which can be preserved when the co-defendant testifies at trial and subjects himself to cross-examination. *See Nelson* v. *O'Neil,* 402 U.S. 622 (1970).

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[2] This rule of admissibility does not apply when a third-party conviction is "offered by the Government in a criminal prosecution for purposes other than impeachment." Fed. R. Evid. 803(22). The purpose of this exception is to avoid a conflict with the right of confrontation construed in *Kirby.* Fed. R. Evid. 803(22) (Advisory Committee's Note).

Appendix A

The appellant has presented his claim of a deprivation of confrontation rights to this court and to the district court in terms of a violation of *United States* v. *Toner,* 173 F.2d 140 (3d Cir. 1949). In *Toner,* this court ruled that the guilty plea of a co-conspirator was not admissible to prove the guilt of a criminal defendant. The opinion does not mention the confrontation clause specifically, and the court might well have rested its ruling on different or additional grounds, including non-constitutional grounds.[3] Nonetheless, the ruling in *Toner* was mandated by the Supreme Court's construction of the confrontation clause in *Kirby.* Therefore, I read *Toner* as reflecting the requirements of the confrontation clause and recognize that appellant has stated a sufficient claim of a violation of his confrontation rights.

Because the majority and I rely on different constitutional claims, I must consider also whether appellant fairly presented the substance of his federal claim to the Supreme Court of New Jersey and thereby satisfied the requirement of exhaustion of state remedies, *Picard* v. *Connor,* 404 U.S. 270, 278 (1971); *Zicarelli* v. *Gray,* 543 F.2d 466, 470-75 (3d Cir. 1976). The brief that appellant filed in the Supreme Court of New Jersey argues explicitly that the state's violation of *Toner* deprived him of rights under the sixth amendment. Moreover, the opinion of the

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[3] The opinion does address the same general concern addressed in *Kirby*: the use of third-party guilty pleas to prove facts against a defendant allows the government to rely on the establishment of facts in a proceeding in which the defendant did not participate. The court concluded, "The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution of someone else." *Id.* at 142.

Appendix A

New Jersey court discusses and rejects the suggestion that the rule in *Toner* reflects the requirements of the confrontation clause. *State* v. *Stefanelli,* 78 N.J. 418, 396 A.2d 1105, 1111-12 (1979). It is true that appellant did not present the New Jersey court with a citation of *Kirby* or with an argument incorporating *Kirby's* particular application of the confrontation clause. However, because that application of the confrontation clause derives from a reported opinion of the Supreme Court of the United States, it is a method of analysis readily available to the state court. Its specific citation was not necessary to satisfy the exhaustion requirement. *Zicarelli* v. *Gray, supra* at 472. I conclude that appellant has satisfied the exhaustion requirement.

The majority reads *Toner* as reflecting the requirements of the due process clause because its restriction on the government's use of third-party guilty pleas is an essential element of fundamental fairness. *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642-43 (1974). Review of state convictions under a standard of fundamental fairness allows the federal court to ensure that state criminal defendants do not suffer from trial errors that are inconsistent with the concept of justice implicit in the due process clause but are not prohibited by specific provisions of the Bill of Rights. The fundamental fairness standard is necessarily very general in its terms and not greatly restricted in its application by specific precepts and precedents. A court should not employ this standard when it can base a finding of constitutional error on a specific provision of the Constitution. In this case, the court's judgment can rest on a specific provision of the Bill of Rights and on a Supreme Court application of that provision to the particular circumstances of this case. Invocation of the

fundamental fairness standard of the due process clause is unnecessary and best avoided.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Order Reversing Order of the District Court and Remanding Cause Thereto, Dated June 12, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2040

BISACCIA, ROBERT,

Appellant

vs.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

(D.C. Civil No. 79-0301)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and HIGGINBOTHAM, *Circuit Judge* and SIMMONS, *District Judge**

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* Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 17, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 3, 1979, be, and the same is hereby reversed and the cause is remanded to the said District Court for the limited purpose of determining whether the constitutional error which is demonstrated in this case was harmless beyond a reasonable doubt, all in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:

THOMAS P. QUINN
Clerk

June 12, 1980

APPENDIX C

Indictment by the Grand Jury of Essex County, New Jersey, Dated September 11, 1974

ESSEX COUNTY TO WIT:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

> NICHOLAS STEFANELLI a/k/a NICKY SKINS, GERALD SPERDUTO, ROBERT BISACCIA a/k/a CABERT, JOSEPH CICALA, NELSON TOSI, SAM CORSARO a/k/a LITTLE SAM AND JOHN QUARTUCCIO a/k/a JOHNNY RELIEF

between on or about the 15th day of July, 1972 and on or about the 1st day of September, 1972, in the City of Newark and in the Town of Belleville, County of Essex aforesaid and within the jurisdiction of this Court, did commit the crime of conspiracy in that then and there they unlawfully and corruptly conspired, confederated and agreed among themselves and with Gerard Charles Festa, who is named as a co-conspirator but not as a defendant herein, wilfully and feloniously, (A) to break and enter the premises of Dominick Bruno, in violation of N.J.S. 2A:94-1 and (B) to steal, take and carry away the money, goods and chattels, of Dominick Bruno found therein, in violation of N.J.S. 2A:119-2, contrary to the provisions of N.J.S. 2A:98-1.

And the Grand Jurors aforesaid, upon their oath, do further present that in execution of the said conspiracy and to effect the objects thereof, the following Overt Acts were committed between on or about the 15th day of July, 1972 and the 1st day of September, 1972.

Appendix C

Overt Acts

1. Joseph Cicala told Gerard Charles Festa that the Bruno house contained jewelry and money and that the Bruno's frequently spent weekends at the shore.

2. John Quartuccio a/k/a Johnny Relief and Gerard Charles Festa inspected the premises in question and found what appeared to be a burglar alarm installation.

3. Gerard Charles Festa met with Nicholas Stefanellli a/k/a Nicky Skins and after Gerard Charles Festa showed the house to Nicholas Stefanelli a/k/a Nicky Skins, it was agreed that Nicholas Stefanelli a/k/a Nicky Skins, Nelson Tosi and Robert Bisaccia a/k/a Cabert would perpetrate the entry and that they would divide the proceeds with Gerard Charles Festa and John Quartuccio a/k/a Johnny Relief.

4. On or about the 27th day of August, 1972 Nicholas Stefanelli a/k/a Nicky Skins, Robert Bisaccia a/k/a Cabert, Gerald Sperduto, Nelson Tosi and Sam Corsaro a/k/a Little Sam did break and enter the premises of Dominick Bruno at 392 Ridge Street, Newark, New Jersey and did steal and carry away money, jewelry and other things of value therefrom.

All said acts being contrary to the provisions of N.J.S. 2A:98-1 and N.J.S. 2A:98-2, against the peace of this State, the government and dignity of the same.

Appendix C

Second Count

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Nicholas Stefanelli a/k/a Nicky Skins, Gerald Sperduto, Robert Bisaccia a/k/a Cabert, Joseph Cicala, Nelson Tosi, Sam Corsaro a/k/a Little Sam and John Quartuccio a/k/a Johnny Relief on or about the 27th day of August, 1972 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did wilfully enter the premises of Dominick Bruno with intent to steal contrary to the provisions of N.J.S. 2A:94-1 and against the peace of this State, the government and dignity of the same..

Third Count

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Nicholas Stefanelli a/k/a Nicky Skins, Gerald Sperduto, Robert Bisaccia a/k/a Cabert, Josepeh Cicala, Nelson Tosi, Sam Corsaro a/k/a Little Sam and John Quartuccio a/k/a Johnny Relief on or about the 27th day of August, 1972 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did steal, take and carry away, money, jewelry and other items of value of which exceeds $500.00 the property of Dominick Bruno contrary to the provisions of N.J.S. 2A:119-2, and against the peace of this State, the government and dignity of the same.

Joseph P. Lordi
County Prosecutor
By: Joseph A. Falcone

APPENDIX D

Judgment of Conviction of Robert Bisaccia, Dated June 3, 1975

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY COURT

JUDGMENT SHEET

Form A

THE STATE OF NEW JERSEY

vs.

ROBERT BISACCIA

Defendant

Indictment No.: 75-74

Attorney: Daniel Isles

Prosecutor: Glenn Goldberg

Court Reporter: Rappaport

The defendant, being charged on 9-11-74 on Ind. No. 75-74 for the crime of Conspire, Enter Larceny and the defendant having pleaded Not Guilty and thereafter, having on 5-1-74 been tried with a jury and a verdict of guilty having been rendered.

It is, therefore, on Jun 3 1975 ordered and adjudged that the defendant be and is sentenced to:

Appendix D

Ct 1 Not Less than 1 year nor more than 2 years at N.J. State Prison. To pay a fine of $1000.00.

Ct 2 Not Less than 4 years nor more than 5 years at N.J. State Prison. To pay a fine of $2000.00. Concurrent with Sentence Imposed on Ct. #1.

Entered by
JOHN F. MCTERNAN

RALPH L. FUSCO
Judge Superior Court

REASONS FOR SENTENCE IMPOSED

Retribution
Deterent
Rehabilitation

Judge Superior Court
RALPH L. FUSCO

Ct 3 Not Less than 4 years nor more than 5 years at N.J. State Prison. To pay a fine of $500.00

Consecutive to Sentence Imposed on Ct. 2. Restitution in amount of $8000.00. Committed until fine & restitution paid.

Restitution to be paid in aggregate w/defendants Sperduto, Stefanelli & Corsaro.

APPENDIX E

Opinion of the New Jersey Superior Court, Appellate Division, Dated March 28, 1977

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3473-74

A-3488-74

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS STEFANELLI, SAMUEL CORSARO and ROBERT BISACCIA,

Defendants-Appellants.

Argued January 11, 1977—Decided March 28 1977

Before Judges Matthews, Seidman and Horn.

On appeal from the Superior Court, Law Division, Essex County.

Mr. Thomas Ford, Designated Counsel, argued the cause for appellants Stefanelli and Corsaro (Mr. Stanley C. Van Ness Public Defender, attorney); Mr. Thomas Ford, Retained Counsel, argued the cause for appellant

Appendix E

Bisaccia (Mr. Frank H. Reimers, of counsel and on the brief for all appellants).

Mr. Marc J. Friedman, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney).

PER CURIAM

Defendants were each found guilty after a two and one-half week jury trial of three counts of an Essex County Indictment which charged them each with conspiracy to break and enter and conspiracy to commit larceny (N.J.S.A. 2A:98-1); entering with intent to steal (N.J.S.A. 2A:94-1), and larceny of goods the value of which exceeded $500 (N.J.S.A. 2A:119-2). The trial judge sentenced Bisaccia to an aggregate five to seven years, and Corsaro and Stefanelli to an aggregate seven to nine years on the three charges.

Defendants have filed an elaborate brief on appeal raising numerous arguments for reversal which we treat seriatim.

A brief statement of the facts is necessary for an understanding of the various arguments raised by defendants on this appeal.

The evidence adduced by the State establish that one Cicala, as the result of knowledge obtained by him, informed one Festa that a house in North Newark owned by the Brunos would probably be a good place to burglarize because of the probable existence of items of wealth therein. Cicala stated that he knew Festa to be a professional burglar, and it was his hope that if Festa was successful in burglarizing the Bruno home, he would receive a cut in any proceeds. Approximately two weeks

after speaking to Festa, Cicala was informed by Festa that the job could not be successful because of the existence of a burglar alarm in the house. That was the end of Cicala's activities with respect to any burglary, and he never received any proceeds of the burglary that ultimately ensued.

Festa testified as to his conversation with Cicala and corroborated the fact that Cicala had nothing further to do with the conspiracy or entry once he had informed him of the existence of the burglar alarm. However, Festa, after checking the house, contacted Stefanelli and one Sperduto about the Bruno house. Subesquently, the State contends, Corsaro, Bisaccia, Sperduto and Stefanelli, bypassed the burglar alarm and entered the Bruno home and stole various items, the value of which exceeded $500. It was through the cooperation of Festa with the State that the three defendants and Sperduto were apprehended. As indicated, Festa testified at trial and was, for all intents and purposes, the State's "star" witness.

I

The Admission of the Testimony of Cicala with Respect to the Conspiracy

Defendants first contend that the trial judge improperly permitted the testimony of Cicala to be admitted against them. The trial judge relied on Evid. R. 63(9) which permits a statement to be admitted against a party if that statement was made while the party and the declarant were participating in a plan to commit a crime and the statement was made in furtherance of that plan, as the basis for admission. The State denies that it used this

rule as the basis for admission. Rather, it contends that the testimony of Cicala was admissible because he was a coconspirator. We have some doubt as to both the relevancy and the competency of the testimony of Cicala considering the proofs of the State as adduced.

Cicala's conversation with Festa with respect to the Bruno house and its contents took place during June of 1971. The conversation between Festa and him with respect to the burglar alarm took place not more than two weeks thereafter. It is undisputed that there were no conversations betweten Cicala and Festa, or Cicala and any of the defendants between June 1971 and August 1972. The indictment under which these defendants were charged alleged that a conspiracy existed among the parties "between on or about the 15th day of *July 1972* and on or about the first day of September 1972." Although the indictment was later amended to have a commencement date of the conspiracy in June 1971 (an amendment about which we have grave doubt) the proofs adduced by the State do not tie Cicala to the three defendants in any way. For this reason without deciding the issue presented to us, we observe that the use of Cicala's testimony was probably an example of prosecutorial "overkill", and is harmless error.

II

The Admission of Assistant Prosecutor Falcone, Detective Donahue and F.B.I. Agent Wilson regarding other crimes of Festa.

As indicated, Festa became the principal witness for the State. Festa had a long career of criminal activity both

in this State and the State of Pennsylvania. He was also involved with federal authorities. Under an arrangement made with the federal authorities and the Essex County Prosecutor's office, Festa was to cooperate in solving numerous crimes in return for which he was to receive lenient treatment with respect to sentencing. In addition, the New Jersey authorities were to appear in Pennsylvania and inform the sentencing court there of Festa's cooperation with authorities here in New Jersey. Anticipating an attack on Festa's credibility on cross-examination, the State produced the Assistant Prosecutor, a detective and an F.B.I. agent to describe the extent of Festa's cooperation with authorities and the promises that were made to him for such cooperation.

Defendant's first argument that it was improper for the State to introduce evidence of Festa's criminal activity on direct examination is without merit. We do not read Rule 20 as inhibiting such a procedure. Nor do we find any limitation in this respect in the provisions of N.J.S.A. 2A:81-12. Moreover, we do not regard the testimony of the three witnesses mentioned as an attempt to neutralize the testimony of any witness, or as being supportive of Festa's credibility. It was obviously nothing more than an attempt on the part of the prosecution to establish that an agreement existed between the prosecutor's office and Festa whereby Festa would benefit if he told the truth and provided the prosecutor with information that would implicate others.

Defendants' second argument that this testimony went to the reliability of Festa's testimony is also without merit. It was the cross-examination of the three witnesses mentioned in which defense counsel, over the objection of the prosecutor indeed, elicited from the witnesses that they be-

lieved the testimony that Festa hads given. Any error, if it existed, was induced by defense counsel's cross-examination and not by the State.

III

The Admission into Evidence of Cicala's Guilty Plea to the Conspiracy Indictment

Prior to trial, Cicala pleaded guilty to conspiracy to break and enter the home of Bruno, however, he refused to plead guilty to the indictment in which he was charged because the conspiracy alleged therein extended between the 15th day of July 1972 to the 1st day of September 1972. The trial judge agreed with Cicala and refused to let him plead to that indictment as it stood because of the time discrepancy. As a result, the date of the indictment was amended by the trial judge at the request of the prosecutor so that the conspiracy was alleged to have begun in June 1971. Cicala pleaded guilty to the first count of the indictment as amended. In response to the plea bargain, the second two counts with respect to Cicala were dismissed. When Cicala took the stand, the trial judge permitted him to testify that he had enterd a guilty plea to the charge of conspiracy. Defense counsel objected to this testimony on the ground that Cicala had not entered a guilty plea to the first count of the unamended indictment which charged his defendants with conspiracy. The trial judge overruled the objection because he had amended the indictment.

The State argues that permitting Cicala to testify that he had entered a guilty plea to the conspiracy charge was for the purpose of affecting the credibility of the witness

by showing his interest in the result of the case; and regardless of the admissibility of the actual guilty plea, this evidence was of little impact in light of the detailed testimony of the witness with regard to his participation in the crime. We believe this argument simply begs the issue.

The prosecutor's argument is negated by the words of the assistant prosecutor in referring to Cicala's plea during the summation:

> * * * [A] young man named Joseph Cicala pleaded guitly to conspiring to break, enter and commit larceny inside the Bruno home. They [the defendants] said it never happened, you see. Mr. Cicala pleaded guilty to something that didn't happen.
>
> Ladies and gentlement, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you as if you were a bunch of five year old children?

Defense counsel objected to these remarks; however, his objection was predicated upon the fact that Cicala had not entered a guilty plea to the original indictment but the amended indictment.

It is fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy. After all, an individual would not plead guilty to a conspiracy that did not exist. We believe even the inference to be drawn from this testimony created prejudice which had to affect the outcome of the trial. In addition, no limiting instruction was given by the trial judge so that the jurors were permitted to use Cicala's testimony as they pleased.

Appendix E

The prejudicial error inherent in the admission of such testimony was referred to in *United States* v. *Toner,* 173 F.2d 140, 142 (3 Cir. 1949):

> From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. There are many such instances in the law. See 4 *Wigmore, Evidence* §1171 *et seq.* (3d Ed. 1940).
>
> The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. We think that the charge given upon this point was contrary to that rule and inadvertently, of course, deprived the defendant of a very substantial protection to which he was entitled.
>
> (173 F.2d at 142) (footnotes omitted)

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In addition, we note Cicala's guilty plea was made to an amended indictment which extended the period of the alleged conspiracy. The grand jurors who considered the evidence and ultimately handed up the indictment charging these three defendants ostensibly did not consider any evidence with respect to proceedings before July 1972. The amendment here was made merely to accommodate Cicala. Defendants were not charged by the grand jurors with having conspired prior to the 1972 date.

IV

Miscellaneous Arguments for Reversal

We are satisfied from our review of the record that the arguments of defendants raised with respect to (a) the testimony of the assistant prosecutor regarding the sentence to be received by Festa in Pennsylvania and the prosecutor's reference to it in summation; (b) the prosecutor's comment that the testimony of F.B.I. Agent Wilson should be believed because of his official position; (c) the testimony with respect to the alleged telephone conversation between Festa's daughter and one of the co-defendants; (d) the variance between the amended and unamended indictments and the proof adduced at trial; (e) the alleged testimony of the assistant prosecutor that Festa was in protective custody, and (f) that there was cumulative error in all the foregoing requiring reversal, to be without merit.

Because of the error found under Point III, above, relating to the testimony of Cicala with respect to his guilty plea to the conspiracy charge, we find defendants

to have been prejudiced to the extent that they were denied a fair trial. Accordingly, the convictions are reversed and the cause remanded to the Essex County Court for a new trial.

APPENDIX F

Order Granting Petition for Certification, Dated June 1, 1977

SUPREME COURT OF NEW JERSEY

C-743 SEPTEMBER TERM 1976

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

vs.

NICHOLAS STEFANELLI, *et al.*,

Defendants-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is granted solely as to the issue of the use of the testimony by Cicala as to his plea of guilty and the prosecutor's comments thereon.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 1st day of June, 1977.

FLORENCE R. PESKOE
Clerk

Filed

June 1 1977

FLORENCE R. PESKOE
Clerk

APPENDIX G

Opinion of the New Jersey Supreme Court, Dated January 10, 1979

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

NICHOLAS STEFANELLI, SAMUEL CORSARO, and ROBERT BISACCIA,

Defendants-Respondents.

Argued April 25, 1978—Decided January 10, 1979.

Mr. Marc J. Friedman, Deputy Attorney General, argued the cause for appellant (*Mr. John J. Degnan,* Attorney General of New Jersey, attorney; *Mr. Donald S. Coburn,* Essex County Prosecutor, of counsel).

Mr. Thomas P. Ford, Jr. argued the cause for respondents (*Mr. Stanley C. Van Ness,* Public Defender, attorney for respondents Stefanelli and Corsaro; *Mr. Thomas P. Ford, Jr.,* attorney for respondent Bisaccia).

The opinion of the court was delivered by

HANDLER, J. Defendants Nicholas Stefanelli, Gerald Sperduto, Robert Bisaccia, Joseph Cicala, Nelson Tosi, Sam Corsaro and John Quartuccio were indicted and charged with conspiracy to break and enter and to com-

mit larceny (N.J.S.A. 2A:98-1) as well as the substantive offenses of entering with intent to steal (N.J.S.A. 2A:94-1) and larceny of goods valued over $500 (N.J.S.A. 2A:119-2). There followed an extended trial on these charges. The cases against defendants Cicala, Tosi and Quartuccio were disposed of prior to the completion of the trial. The remaining defendants were eventually convicted by the jury and later sentenced. Appeals were taken by Bisaccia, Corsaro and Stefanelli. The Appellate Division, in a reported *per curiam* opinion, reversed these convictions and remanded the matter for a new trial. *State* v. *Stefanelli,* 153 N. J. Super. 452 (App. Div. 1977). This Court granted certification limited to the "issue of the use of the testimony of Cicala as to his plea of guilty and the prosecutor's comments thereon." 75 N. J. 4 (1977).

I

The indictment charged in three counts that between July 15, 1972 and September 1, 1972, defendants conspired with Gerald Festa, an unindicted co-conspirator, to break and enter the home of Dominick Bruno, to steal money, goods and chattels and that on August 27, 1972, defendants actually broke into Bruno's home and stole money and jewelry valued in excess of $500. The indictment recited four overt acts commited in furtherance of the conspiracy. Of special importance here is the first overt act relating to defendant Joseph Cicala. This act, according to the indictment, consisted of a conversation between Cicala and Festa during which Cicala informed Festa that money and jewelry were contained in the Bruno home and the home was frequently unoccupied on weekends. The indictment did not specify the date of this conversation and did not in any other way refer to Cicala.

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On the day of trial, Cicala appeared before the trial judge and pled guilty to the conspiracy charge pursuant to a plea bargain. In exchange for the guilty plea the State agreed to recommend that the remaining counts of the indictment be dismissed and that Cicala receive "consideration" at the time of sentencing for his "cooperation" with the State. Cicala admitted that he conspired with Festa for the purposes of breaking and entering the Bruno home with intent to steal as set forth in the conspiracy charge and the first overt act; he denied any further involvement with Festa or any of the other defendants. He stated, however, that his converstions with Festa occurred in June 1971, not in 1972 as charged in the indictment. The trial judge, with the acquiescence of Cicala's attorney, stated that he was amending the conspiracy count of the indictment to reflect the conspiracy starting in June 1971. He then accepted Cicala's plea of guilty. No formal amendment order, however, was entered nor was any written notation made upon the official indictment to reflect the amendment authorized by the court. It appears that the other defendants and their attorneys were present in court during these proceedings.

The jury trial then commenced. Cicala was called as a State's witness. He revealed that he was employed as a hairdresser at an establishment within walking distance of the Bruno home and he had observed that one of his customers, Mrs. Dominick Bruno, invariably wore expensive jewelry. He also testified that he was aware that substantial amounts of cash were kept at the Bruno house and that the Brunos were in the habit of vacationing at the Jersey shore. Cicala knew that Festa was a burglar. He stated that he spoke to Festa and suggested that "it might be a good idea to rob the [Bruno] house," and that in the

past he had given such information or "scores" to Festa; Cicala hoped to receive a "cut" or a share of the proceeds of any burglary of the Bruno home. That evening, acting upon his conversation with Cicala, Festa visited the Bruno home to "case the joint" with Quartuccio, an expert in burglar alarms, who found a relatively sophisticated alarm system and told Festa to forget about any break-in of the Bruno home. Festa, in turn, told this to Cicala. Cicala had no further direct or active involvement in the criminal enterprise after this point.

In July, approximately one month after these events (but, in the year 1972, according to Festa's testimony), Stefanelli and Sperduto were approached by Festa as to the feasibility of breaking into the Bruno home. Apparently relying upon Cicala's information, Festa told them of the location of the cash and jewelry in the Bruno home as well as the fact that the home was frequently vacant on weekends. Festa then inspected the Bruno home with Stefanelli who indicated that the burglar alarm posed no problem since Tosi, his brother-in-law, could "jump it". About two weeks later, in late July or early August, according to Festa, Corsaro, Bisaccia and Sperduto visited Festa and made additional inquiries concerning the feasibility of a break-in of the Bruno home.

On August 20, 1972, Dominick Bruno and his family went to San Francisco for a two-week vacation. At 8:30 a.m. on August 27, 1972, the home was discovered to have been ransacked; the police were notified and arrived at the scene. Although there was no evidence of a forced entry, a knife was stuck in the wall holding up the wiring to the burglar alarm, presumably short-circuiting or "jumping" the wires and deactivating the alarm system enabling the

perpetrators to enter the house. Dominick Bruno was contacted by phone that evening and apprised of the incident; he arrived the next day and inspected his home to determine what, if any, items were missing. He claimed a variety of his home furnishings as well as numerous recently acquired goods had been stolen, and subsequently filed an insurance claim of $14,543.90 for stolen and damaged property. Ultimately he collected only $6,800.

The only testimony which directly linked defendants with the actual break-in of the Bruno home came from Festa, the State's principal witness. In addition to his testimony of his own initial conversation with Cicala and his following discussions with the various defendants and exploratory visits to the Bruno home, Festa stated that he did not learn of the actual break-in until approximately one week after its occurrence. He had received a telephone call from Stefanelli who, without mentioning the break-in, requested that Festa meet with him. Moments before Festa was about to leave his home to meet with Stefanelli, however, he was visited by a detective of the Bandit Squad of the Newark Police Department. When questioned by the detective, Festa denied any participation in the break-in and he was told that the thieves "got a couple of good pieces of jewelry but missed the money." Festa then met Stefanelli, in the presence of Bisaccia and Sperduto, and it was admitted to Festa that they had committed the crime or, in their argot, the Bruno "score". They mentioned that Tosi had disconnected the burglar alarm enabling them to enter the Bruno home, and once inside the house they searched unsuccessfully for cash and jewelry, generally tearing the house apart in the process, and they had telephoned Festa from the Bruno home but did not reach him.

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The genesis of the issue on this appeal occurred during Cicala's testimony when he related the circumstances surrounding his guilty plea. Cicala, it is to be recalled, had given a detailed account of his early though limited involvement in the conspiracy. After Cicala had so testified, the prosecutor asked him whether he had been arrested in this matter. Defense counsel objected on general grounds, but the court overruled the objection and the witness answered in the affirmative. At this point the prosecutor began to inquire into Cicala's cooperation with the Essex County Prosecutor's Office when defense counsel interrupted the questioning, and the following colloquy ensued:

> Defense counsel: Is the purpose of the Prosecutor's question to bolster the credibility of his witness? I believe he has testified as to what he knows regarding this particular incident. He has testified as to what is relevant as far as this case is concerned.
>
> Now, what the Prosecutor is attempting to do I think is bolster the credibility of his witness by the form of questions as to what might have happened subsequent to this event as to conversations he might have had.
>
> Quite obviously, after whatever relationship he had with this particular incident terminated by his giving any statement to them—
>
> Prosecutor: Not at all, your Honor, the purpose of these questions is to advise the jury and the Court—
>
> Court: I am going to allow the question without hearing your purpose.

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Cicala then stated that "recommendations would be made to the sentencing judge as to my cooperation in this case." He further testified that he had previously pled guilty to the first count of the indictment. Defense counsel thereupon objected to this testimony but solely on the ground that Cicala had pleaded guilty to the indictment as amended and not the original indictment. This objection was also overruled by the court for the reason that he had "amended the indictment".

Cicala's testimony concerning his guilty plea was subsequently commented upon by the prosecutor during summation. The prosecutor, in an apparent attempt to refute the innuendo of defense counsel that the crime was engineered by Bruno in order to defraud his insurance company, stated:

> Bruno burglarized his own home, it never happened, and yet a young man named Joseph Cicala pleaded guilty to conspiring to break, enter and commit larceny inside the Bruno home. [Defendants] said it never happened, you see. *Mr. Cicala pleaded guilty to something that didn't happen. Ladies and gentlemen, isn't your intelligence being insulted by an argument like this?* I mean, aren't these defendants talking down to you as if you were a bunch of five year old children? (Emphasis added).

Defense counsel objected to these comments, but was overruled by the court. Defense counsel argued vigorously, out of the presence of the jury, that the court had disallowed any comment to the jury on the disposition of the charges against Tosi (that being a directed judgment of acquittal) and that by permitting the prosecutor now to imply that "because Cicala pleaded guilty • • •

this crime occurred and these defendants are guilty" was patently unfair. The court overruled defense counsel's objection and no cautionary instruction was given the jury. In the charge to the jury, the court, without referring specifically to Cicala's testimony concerning his guilty plea, merely stated in general terms that evidence of the convictions of Festa and Cicala had been introduced for the purpose of affecting their credibility. (Festa had numerous prior convictions as well as pending charges against him; Cicala had also testified to a federal conviction in addition to his guilty plea to the conspiracy under the indictment being tried.) The case was submitted to the jury which returned guilty verdicts against defendants on all counts.

II

Defendants contended before the Appellate Division that Cicala's factual testimony concerning his actual involvement in the conspiracy had been improperly admitted. The court observed that since Cicala's two conversations with Festa occurred during June 1971 and there were no conversations between Cicala and Festa nor any of the defendants thereafter, "the proofs adduced by the State [did] not tie Cicala to the three defendants in any way", 153 N. J. Super. at 456, and thus any error in the admission of this testimony was harmless. The court also expressed "grave doubt" as to the amendment of the indictment, which moved the commencement of the conspiracy back to June 1971 from July 15, 1972 as originally charged. *Id.* The Appellate Division, however, did not actually rule upon either of these contentions.

There should be dispelled at the outset any outstanding doubt as to whether Cicala's testimony of his actual partici-

pation in a criminal conspiracy with Festa to burglarize the Bruno home was relevant to the issue of the guilt of the other indicted defendants. The testimony of Cicala, as well as Festa, disclosed that Cicala conceived the criminal scheme to burglarize the Bruno home; his conversations with Festa evidenced an unlawful agreement to accomplish this. It was obviously their understanding that Festa, a professional burglar, would attempt to follow up on this lead and, if he were successful, Cicala would share in the fruits of the burglary.

This testimony spelled out a criminal conspiracy, the essence of which is the unlawful agreement. It is not essential that the conspiracy be successful or that the agreement be fully or substantially carried out; if there be an agreement to accomplish a criminal end, it is sufficient that some step, no matter how small or innocuous, be taken to further the conspiracy. See *State* v. *Carbone,* 10 N. J. 329, 336-338 (1952); also *State* v. *Dennis,* 43 N. J. 418, 423-424 (1964); *State* v. *Lennon,* 3 N. J. 337, 341-342 (1949). The relevance of this evidence to the issue of the guilt of the other indicted defendants is patent. These defendants, according to the testimony, joined the conspiratorial plan which had been conceived by Cicala and launched by Festa. The ignorance of defendants as to how the conspiracy was hatched and of Cicala's initiating role or expectations in no way alters their own criminal responsibility. *State* v. *Carbone, supra; State* v. *Graziani,* 60 N. J. Super. 1, 18 (App. Div. 1959), aff'd o.b. 31 N. J. 538, *cert.* den. 363 U. S. 830, 80 S. Ct. 1601, 4 L. Ed. 2d 1524 (1960). Nor does the fact that Cicala had no personal knowledge of the outcome of his plan or of the identities of the persons who later executed the plot lessen defendants' actual part in the burglary scheme. *Cf. U. S.* v. *Cohen,* 197 F. 2d 26, 29 (3 Cir. 1952).

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With respect to the concern of the Appellate Division over the change of dates in the indictment to accommodate the receipt of Cicala's guilty plea, the indictment was clearly amendable to show the earlier date. Our rules permit amendments "to correct * * * the description of the offense intended to be charged" so long as this does not result in charging a "different offense" and "the defendant will not be prejudiced thereby in his defense on the merits." R. 3:7-4. The change of date to accord with Cicala's version of the time did not result in the presentation of a "different offense." Where, as here, time is not crucial either to the defense to or prosecution of a charged offense, an amendment changing or correcting a date is not objectionable. *State* v. *Witte,* 13 N. J. 598, 604-607 (1953); *State* v. *Kuske,* 109 N. J. Super. 575, 583-586 (App. Div. 1970); compare *State* v. *Sing Lee,* 94 N. J. L. 266 (E. & A. 1920) and *State* v. *Faulks,* 97 N. J. L. 408 (Sup. Ct. 1922). Generally, "time is not of the essence of the offense of conspiracy", *State* v. *Unsworth,* 85 N. J. L. 237, 241 (E. & A. 1913), and it was not so in this case. Moreover, defendants were neither prejudiced by nor unprepared for any variance between dates. See *State* v. *Holder,* 137 N. J. Super. 300, 305 (App. Div. 1975). They were present in court when Cicala entered his guilty plea and could anticipate completely his later testimony at trial to the same effect. Furthermore, they did not seek any clarification of the judge's amendment of the indictment nor did they request a postponement of trial as a condition to the amendment, R. 3:7-4, and in fact, defense counsel fully exploited the asserted disparity between the dates on Cicala's cross-examination.

In short, the Appellate Division expressed needless misgivings as to the relevance of Cicala's testimony concern-

ing his actual participation in the conspiracy, as well as to the actual or assumed amendment of the indictment to charge the conspiracy as having begun in June 1971. The testimony was clearly material to the issue of the guilt of defendants and it did not, either in terms of its general relevance or in relation to the conspiracy charge of the indictment, catch defendants by surprise or prejudice them in their defense.

III

The Appellate Division's opinion focused upon Cicala's guilty plea testimony. The court found "[i]t is fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy" and, upon the authority of *United States* v. *Toner,* 173 F. 2d 140 (3 Cir. 1949), it held that the plea of guilty by Cicala as an alleged co-conspirator should have been excluded and that its admission constituted reversible error. 153 N. J. Super. at 459.

The traditional view is that the guilty plea of a co-defendant is inadmissible in the separate trial of another defendant as substantive evidence of the latter's complicity. See, *e.g., United States* v. *Harrell,* 436 F. 2d 606, 614-616 (5 Cir. 1970); *United States* v. *Toner, supra,* at 142; *State* v. *Felton,* 131 N. J. Super. 344 (App. Div. 1974) certif. den. 68 N. J. 140 (1975); Annot., "Admissibility of Statements of Coconspirators Made After Termination of Conspiracy and Outside Accused's Presence", 4 A. L. R. 3d 671, 709-710 (1965). The policy underlying this rule is that once a defendant is on trial, he "is entitled to have the question of his guilt determined upon the evidence against him, not on

whether a Government witness or co-defendant has plead [sic] guilty to the same charge." *Babb* v. *United States,* 218 F. 2d 538, 542 (5 Cir. 1955); also *United States* v. *Hall,* 178 F. 2d 853 (2 Cir. 1950); accord, *State* v. *Atkinson,* 25 N. C. App. 575, 214 S. E. 2d 270 (Ct. App. 1975). As stated in *United States* v. *Toner, supra* at 142:

> From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. There are many such instances in the law. See 4 Wigmore, Evidence § 1171 et seq (3d ed. 1940).
>
> The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. * * * (*Id.*) (Footnotes omitted)

The State attempts to minimize in this case the significance of the substantive use of a co-conspirator's guilty plea. It urges that an important reason for the general

rule of exclusion is the right of a defendant under the Sixth Amendment to confront his accusers; consequently where, as here, the co-defendant is a witness at the trial and available for cross-examination, the reasons for exclusion of the guilty plea are undercut substantially.

It is true, of course, that the Sixth Amendment right of confrontation under the circumstances of a given case may constitute a compelling reason for excluding a co-defendant's guilty plea. See, *e.g., State* v. *Atkinson, supra,* 214 S. E. 2d at 272 (evidence that a co-defendant, who is not a witness, has pled guilty to the charge against defendant deprives defendant of his constitutional rights of confrontation and cross-examination). A similar argument for exclusion might also be predicated upon the hearsay rule. See *Dutton* v. *Evans,* 400 U. S. 74, 86-90, 91 S. Ct. 210, 218-220, 27 L. Ed. 2d 213, 225-227 (1970); *McKethan* v. *U. S.,* —— U. S. ——, 99 S. Ct. 333, 58 L. Ed. 2d 333 (1978) (denial of petitions for writs of certiorari, Stewart, J. dissenting). Thus some courts have excluded prior confessions of guilt as substantive evidence of the guilt of other defendants because such confessions constitute extra-judicial statements, whether or not the declarant is testifying at trial; *e.g., United States* v. *Hicks,* 420 F. 2d 814 (5 Cir. 1970); *cf. Sothern* v. *Van Dyke,* 114 N. J. L. 1 (E. & A. 1934); *Gray* v. *State,* 221 Md. 286, 157 A. 2d 261, 263-264 (Ct. App. 1960); *State* v. *Cole,* 252 Or. 146, 448 P. 2d 523, 528 (Sup. Ct. 1958). But other courts have concluded that where a declarant is available as a witness at trial, a prior extra-judicial statement loses its character as hearsay, *Northwestern Mutual Life Insurance Co.* v. *Linard,* 498 F. 2d 556, 560 (2 Cir. 1974); *Vincent* v. *Thompson,* 50 A. D. 2d 211, 377 N. Y. S. 2d 118, 130-131 (App. Div. 1975); *cf. Cain* v. *George,* 411 F. 2d 572, 573 (5 Cir. 1969),

especially so when the extra-judicial statement is offered through the testimony of the declarant as a witness. See *Ikerd* v. *Lapworth,* 435 F. 2d 197, 206 (7 Cir. 1970); Advisory Committee Note, Fed. R. Evid. 801(d); IIIA Wigmore, Evidence § 1018 (Chadbourn Rev. 1974); McCormick, Evidence § 251. Under this thesis, it might be reasoned, the admission of the prior confession through the live trial testimony of the declarant as a witness would not violate the hearsay rule.

These approaches are not controlling in resolving the problem raised in this appeal. The reasonableness of using a guilty plea against co-defendants as substantive evidence of their guilt cannot be made to turn upon whether such use would otherwise satisfy the Sixth Amendment or the hearsay rule. These safeguards secure certain imperatives vital to a criminal defendant on trial, particularly the need to be able to confront adverse witnesses and to assure that evidence bearing upon guilt is reliable and trustworthy. They do not address the cognate, elementary concern that all evidence directed to the issue of guilt be probative, material and relevant.

It is with reference to its probative quality that the guilty plea testimony of Cicala must be considered. It may be that as a matter of common experience one might believe that because one co-conspirator has pleaded guilty to a joint crime, others similarly charged are also guilty. *United States* v. *Toner, supra; cf. State* v. *Felton, supra.* It is not enough, however, that a guilty plea simply as a matter of logic be relevant or probative of the guilt of others. *United States* v. *Toner, supra* at 142. There may be, and often are, many other undisclosed or collateral factors actuating a guilty plea in addition to guilt in fact. *Bordenkircher* v. *Hayes,* 434 U. S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978);

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Blackledge v. *Allison,* 431 U. S. 63, 72, 97 S. Ct. 1621, 1628, 52 L. Ed. 2d 136, 145 (1977); *Brady* v. *United States,* 397 U. S. 742, 756-757, 90 S. Ct. 1463, 1473, 25 L. Ed. 2d 747, 761 (1970). It is for that reason that a guilty plea of one person as such cannot be considered satisfactory or worthy evidence of the guilt of others even though similarly circumstanced and is properly excludable under the axiom that a defendant on trial is entitled "to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *United States* v. *Toner, supra* at 142; *Babb* v. *United States, supra* at 542. Hence we conclude, as did the court below, that Cicala's guilty plea was inadmissible as substantive evidence of the guilt of the defendants.

The State's strongest argument is that Cicala's plea was properly admissible for purposes of affecting credibility and that, under all of the circumstances, it did not have a sufficiently prejudicial effect as substantive evidence to require reversal of the convictions. The States relies upon both N.J.S.A. 2A:81-12 and Evid. R. 20 to justify the admissibility of Cicala's guilty plea. N.J.S.A. 2A:81-12 provides that: "[f]or the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter or his conviction of any crime may be shown * * *." Evid. R. 20 permits introduction of "evidence relevant upon the issue of credibility."

Cicala's guilty plea was definitely admissible to affect his credibility as a witness. Defendants assert, however, that the State was limited to questioning Cicala with respect to whether "he ever pleaded guilty to a crime, what type of crime it was, and what sentence he received"; beyond this,

it is argued, any questioning as to the details of the crime was improper. Clearly this is not so. Cicala's guilty plea was presented to the jury as part of a plea bargain and the jury was advised that it involved a promise of consideration or a suggestion of leniency at the time of sentencing for his "cooperation" in the prosecution. Thus, the testimony of the guilty plea and the surrounding circumstances constituted evidence bearing directly upon Cicala's "interest in the result of the action", N.J.S.A. 2A:81-12, and was highly "relevant upon the issue of [his] credibility." Evid. R. 20. See *State* v. *Hodgson*, 44 N. J. 151, 163 (1965); *United States* v. *Bryza*, 522 F. 2d 414, 425 (7 Cir. 1975), *cert.* den. 426 U. S. 912, 96 S. Ct. 2237, 48 L. Ed. 2d 837 (1976); *United States* v. *King*, 505 F. 2d 602, 607 (5 Cir. 1974); *State* v. *Cole, supra*, 448 P. 2d at 528; *People* v. *Crawl*, 47 Mich. App. 749, 209 N. W. 2d 809 (Ct. App. 1973), rev'd on other grounds, 401 Mich. 1, 257 N. W. 2d 86 (Sup. Ct. 1977); *cf. State* v. *Sands*, 76 N. J. 127 (1978).

It must nevertheless be acknowledged that the admissibility of the guilty plea on the issue of credibility does not fully meet the defendants' contention that Cicala's plea was improperly admitted as substantive evidence and that its use as substantive evidence in the context of the entire trial was so prejudicial as to constitute reversible error.

The prosecutor, it is to be recalled, was cut off by the court and not given the opportunity to specify the purpose of the guilty plea testimony in the face of defense counsel's objections. Notwithstanding that defense objections to the guilty plea testimony were not clearly articulated, the court was mistaken in not clarifying the purpose of this line of testimony. But more important, the court itself was obligated independently under these circumstances to give the jury a proper cautionary instruction as to the

limited use of this testimony for credibility purposes, even in the absence of a specification of reasons by the prosecutor or a request therefor by defendants. Evid. R. 6; *State* v. *Costa,* 11 N. J. 239, 249 (1953); *State* v. *Felton, supra,* 131 N. J. Super. at 349-350; also *United States* v. *Bryza, supra,* 522 F. 2d at 425; *Freije* v. *United States,* 386 F. 2d 408, 411 (1 Cir. 1967).

Moreover, when a guilty plea of a co-defendant is brought to a jury's attention without any guiding instructions as to its use in their deliberations, the potential for misuse is manifest. *United States* v. *Harrell, supra,* 436 F. 2d at 614; *State* v. *Underwood,* 248 Iowa 443, 447-448, 80 N. W. 2d 730, 734 (Sup. Ct. 1957). This risk of misuse was aggravated here by the prosecutor's remarks during summation. The prosecutor, in effect, told the jury that it was an insult to their collective intelligence to believe that there would have been a guilty plea by Cicala if there had been no conspiracy. Furthermore, the trial court did not at that juncture or later in its general charge to the jury correct the prosecutor's misleading remark. The Appellate Division consequently determined, and we agree, that under all the circumstances no restriction was imposed upon the jury as to the limited admissibility of the evidence of Cicala's plea and that this constituted error. 153 N. J. Super. at 459.

The question becomes whether, in the context of the trial, the error was sufficiently harmful to justify a reversal of the convictions, that is, whether it was clearly capable of producing an unjust result. R. 2:10-2; *State* v. *DiPaglia,* 64 N. J. 288 (1974); see also *State* v. *Macon,* 57 N. J. 325 (1971).

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The absence of a limiting instruction to the jury restricting the use of a guilty plea to the issue of credibility is usually an important factor in determining whether the admission of the plea constitutes harmless error. *United States* v. *Toner, supra.* Compare *United States* v. *Harrell, supra,* 436 F. 2d at 614-616 (reversible error where jury was apprised of witness' guilty plea without proper limiting instructions) and *Freije* v. *United States, supra,* 386 F. 2d at 411 (admission of evidence of guilty plea of co-defendant presupposes that a cautionary charge will be given), with *United States* v. *King, supra,* 505 F. 2d at 607-608 (failure to give a cautionary instruction is but one of many factors to be considered in assessing whether evidence of co-defendant's guilty plea prejudiced accused). *State* v. *Felton, supra,* found such error to be reversible, but in that case evidence of the guilty plea came before the jury with respect to a pleading co-defendant who did not in fact testify at the trial. To the same effect is *Trussell* v. *United States,* 278 F. 2d 478, 480 (6 Cir. 1960). In such a case it is not possible to develop through the testimony of the pleading defendant the facts which underlay the guilty plea, to expose the circumstances under which the guilty plea was given or to attack credibility through cross-examination.

Here, Cicala's complicity in the crime charged against defendants was established independently by his detailed testimony concerning his involvement in the crime; the jury was specifically made aware that the guilty plea was based only upon the facts to which he testified, namely, his criminal conversations with Festa and nothing more. Moreover, he was thoroughly cross-examined and his credibility severely tested. In this context, his guilty plea adds little, if any, extra evidential weight to the proofs

establishing the existence of a conspiracy as between himself and Festa. See *Baker* v. *United States,* 393 F. 2d 604, 614 (9 Cir. 1968). *Cf. State* v. *Riddall,* 251 Or. 506, 446 P. 2d 517, 518 (Sup. Ct. 1968). It adds nothing of substantive consequence beyond the "evidential description" of the underlying crime furnished by the witness in his testimony to the jury. *State* v. *Hodgson, supra* 44 N. J. at 164. Against this factual testimony, the admission of the guilty plea without a limiting instruction was truly harmless. See *State* v. *Cole, supra,* 448 P. 2d at 528 (harmless error when co-conspirators' guilt established by their own testimony which also implicated defendant); also *United States* v. *Alfano,* 152 F. 2d 395, 398 (3 Cir. 1945) (concurring opinion); *United States* v. *Corso,* 100 F. 2d 604, 605-606 (7 Cir. 1938).

We are satisfied that the error did not have the clear capacity to produce an unjust result and that it had a minimal effect on the outcome of the trial. Accordingly, we reverse and reinstate the convictions.

SCHREIBER, J., concurring. I concur in the reversal of the judgment of the Appellate Division and the reinstatement of the convictions. However, I believe that the prosecutor's comments regarding Cicala's plea of guilty to the conspiracy charge when read in the context of his summation may well have been proper.

A criminal conviction generally may be introduced to affect the credibility of a witness. *State* v. *Sands,* 76 N. J. 127 (1978). Our cases also firmly establish that the State had a right on direct examination to disclose Cicala's guilty plea to the jury. In *State* v. *Holley,* 34 N. J. 9, *cert.* den. 368 U.S. 854, 82 S. Ct. 89, 7 L. Ed. 2d 51 (1961), Justice Francis wrote:

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> The law is settled in this jurisdiction that either party on producing a person as a witness may inquire on direct examination if he has been convicted of crime, and show the crime even if an affirmative answer is given. [34 N. J. at 13]

See also *State* v. *Costa,* 11 N. J. 239, 249 (1953); *State* v. *Fox,* 12 N. J. Super. 132 (App. Div. 1951). There are various reasons for the rule, but they are all grounded in considerations of credibility. In *Holley* and *Fox,* it was noted that since the State, like any other party, impliedly represents that a witness it presents is worthy of some credit, it is proper to aid the jury's evaluation of his testimony by bringing out the fact that he has been convicted of a crime. An additional rationale advanced in *Costa* is that such evidence protects the State from any inference that it was withholding information bearing upon the witness' credibility.

In the usual case, the conviction is unrelated to the facts at issue and is used only to impeach credibility. But a conviction relevant to a witness' credibility may also be introduced to support that credibility. This evidentiary principle is embodied in Evid. R. 20 which states that

> for the purpose of * * * supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence relevant upon the issue of credibility * * *. No evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony.

See Fed. R. Evid. 801(d)(1); Uniform R. Evid. 801(d)(1); 4 Wigmore, Evidence § 1129 (1972); *cf. State* v. *Neiman,*

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123 N. J. L. 341 (Sup. Ct. 1939), aff'd o.b. 124 N. J. L. 562 (E. & A. 1940). Compare the "fresh complaint" rule. See *State* v. *Hintenberger,* 41 N. J. Super. 597 (App. Div. 1956). It is possible then for a guilty plea to have a dual impact, cutting in opposite directions, both related to credibility—in one respect supporting veracity and in the other, impeaching it.

Thus, Cicala's plea of guilty was admissible to corroborate and support his testimony. Since the theory of the defense outlined in the opening was that the victim Bruno staged the burglary to collect insurance and Cicala's credibility was sharply challenged by cross-examination,[1] it would seem that the charge of recent fabrication was satisfied. Accordingly, there was compliance with Evid. R. 20.

Arguably one could interpret the prosecutor's comments to the jury to suggest that the guilty plea be considered as substantive evidence. However, after reading the entire summation I am satisfied that the prosecutor was really attempting to stress, and the jury was only lead to believe, that the guilty plea corroborated and supported Cicala's testimonial recital of the facts. Even if this were not so, I agree with the majority that any such error was harmless.

Furthermore, I do not agree with the majority that a guilty plea of a witness who is on the stand and subject to cross-examination cannot be admitted into evidence de-

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[1] Though the guilty plea was offered before cross-examination, its admissibility on one basis would not have precluded its use on another at the time of summation when its permissible scope had been broadened by the defendant's attack on the witness' credibility.

spite its materiality and relevance. The majority appears to believe that the plea's probative value, and therefore its admissibility, depends upon the witness' motivation in entering that plea. However, irrespective of the factors which actuated the plea, our courts do not accept a guilty plea unless there is a factual basis for it. R. 3:9-2. Under our practice the trial court must be satisfied from the lips of the defendant that he committed the acts which constituted the crime. Compare *State* v. *Reali,* 26 N. J. 222 (1958), with *North Carolina* v. *Alford,* 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). See also "Administrative Memo Re: Criminal Pleas," 94 N.J.L.J. 1 (1971). Accordingly, I cannot agree with the majority's conclusion that because a guilty plea may have been motivated by factors other than guilt, it cannot "for that reason" be considered satisfactory or worthy evidence of guilt of others. 78 N. J. at 433.

Other than as stated herein, I concur in the opinion of the majority and join in the judgment of reversal and reinstatement of the convictions.

PASHMAN, J., dissenting. I disagree with the manner in which the majority has disposed of this case. Although I am in accord that the trial court erred in allowing Cicala to testify as to his plea of guilty, I cannot accept the majority's conclusion that this error was harmless beyond a reasonable doubt. I also cannot subscribe to the majority's assertion that evidence of a co-conspirator's guilty plea is always admissible insofar as it bears upon the co-conspirator's credibility as a witness.

I

The overwhelming majority of the courts which have addressed the issue have held that a co-conspirator's guilty

plea is inadmissible as substantive evidence of the existence of a conspiracy in which a defendant has participated. *See, e. g., United States* v. *Harrell,* 436 F. 2d 606 (5th Cir. 1970); *United States* v. *Toner,* 173 F. 2d 140 (3rd Cir. 1949); *State* v. *Felton,* 131 N. J. Super. 344 (App. Div. 1974), certif. den. 68 N. J. 140 (1975). The reasons underlying this exclusionary rule have been ably summed up by the United States Court of Appeals for the Third Circuit:

> From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. There are many such instances in the law.
>
> * * *
>
> Acquittal of an alleged felow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. *The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else.* [*U. S.* v. *Toner, supra,* 173 F. 2d at 142 (citations omitted, footnotes omitted) (emphasis supplied)]

See Babb v. *United States,* 218 F. 2d 538, 542 (5th Cir. 1955); *United States* v. *Hall,* 178 F. 2d 853 (2d Cir. 1950). These same considerations support the conclusion that such

guilty plea evidence is inadmissible whether or not the co-conspirator is present in court and subject to cross-examination. In either situation, the defendant being tried is entitled to a verdict based solely upon proofs relating to whether he himself committed an offense, and not upon evidence bearing on the manner in which an alleged co-conspirator's case has been settled.

As the above cited passage from *Toner* emphasizes, evidence of a co-conspirator's guilty plea is not excluded because it lacks relevance to the issues being adjudicated in the defendant's trial. Reasonable minds could logically infer from such a plea that a conspiracy did indeed exist. Rather, such evidence is inadmissible on grounds of fundamental fairness. It is patently unfair to subject a defendant to criminal sanctions merely because his alleged co-conspirator has not elected to stand trial. In effect, the guilty plea evidence cannot be introduced because its relevance is far outweighed by its potential prejudicial impact upon the jurors' deliberations.

Although acknowledging as much, see *ante* at 430-433, the majority nevertheless concludes that guilty plea evidence can be introduced by the prosecutor over the defendant's objections if utilized solely "to affect [the co-conspirator's] credibility as a witness." See *ante* at 433. This conclusion negates the policies underlying the general exclusion of guilty plea evidence. Moreover, it is premised upon a wholly unrealistic conception of the impact which this evidence will have upon jurors' deliberations.

N.J.S.A. 2A:81-12 does, at first glance, seem to authorize the prosecutor's introduction of guilty plea evidence for purposes of credibility. That statute provides:

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> For the purpose of affecting the credibility of any witness, his interest in the result of the action * * * or his conviction of any crime may be shown by examination or otherwise * * *.

The precise parameters of this statute cannot be appreciated, however, without a consideration of Evid. R. 4, which states in part that

> The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

In *State* v. *Sands*, 76 N. J. 127 (1978), decided less than six months ago, Justice Schreiber speaking for this Court squarely held that N.J.S.A. 2A:81-12 "do[es] not support the conclusion that *every* criminal conviction is automatically admissible . . . to affect the credibility of a criminal defendant." *Id.* at 138 (emphasis supplied). Although all prior convictions of a witness may in some way reflect upon his credibility, we acknowledge that with respect to certain convictions "admission will create undue prejudice." *Id.* at 147. Hence, we ruled that a trial judge must consider all the circumstances of a case prior to allowing any such conviction to be introduced into evidence.

The considerations which led to our holding in *Sands* apply with equal force to the situation here under review. The admission of a co-conspirator's guilty plea may indeed bear somewhat upon his credibility as a witness. However, its probative value is far outweighed by its prejudicial impact upon a defendant's case. Regardless of the presence of limiting instructions, it cannot reasonably be

expected that jurors will appreciate the legal niceties outlined by the judge and utilize such evidence only for credibility purposes. Rather, they are likely to consider this plea as substantive evidence of the existence of a conspiracy in which the defendant participated.

Were "relevance" the only concern in this situation, guilty plea evidence would have to be deemed admissible as substantive evidence that a defendant committed an offense. As noted earlier, reasonable minds could logically infer from such a plea that a conspiracy did indeed exist. It is absurd to take account of the prejudicial impact inherent in such evidence when the guilty plea is relevant to the existence of a conspiracy but not when such a plea bears upon a witness' credibility.

I would therefore hold that unless the defendant otherwise agrees, a trial court may never allow the introduction of evidence dealing with a co-conspirator's guilty plea to crimes for which a defendant is presently being tried. The probative value of such evidence is outweighed by its prejudicial impact. Hence, it should be excluded pursuant to Evid. R. 4.

A *defendant* may, however, wish to introduce such evidence in order to call into question the veracity of a prosecution witness. In such a case, it would be unfair to prohibit the prosecutor on direct examination from first eliciting such evidence in order to negate its potential adverse impact upon the State's case. Prior to the calling of a convicted co-conspirator to the stand, a trial judge should therefore ask defense counsel whether he intends to question the witness as to his plea of guilty. If he answers in the affirmative, then the prosecutor can introduce the plea into evidence on direct examination. Otherwise, he cannot.

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II

In the present case, Cicala's guilty plea was clearly introduced in order to demonstrate that a conspiracy actually existed. In summing up his case before the jury, the prosecutor remarked:

> * * * [A] young man named Joseph Cicala pleaded guilty to conspiracies to break, enter and commit larceny inside the Bruno home. [Defendants] said it never happened, you see. Mr. Cicala pleaded guilty to something that didn't happen. Ladies and gentlemen, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you as if you were a bunch of five year old children?

Thus, even accepting the majority's formulation of the exclusionary rule, the introduction of such evidence constituted error. The majority, however, labels this error "harmless". A review of the record below demonstrates the unsoundness of such a conclusion.

At no point did the trial judge instruct the jury that Cicala's guilty plea could be considered solely for the purpose of credibility. Several courts have held that such a limiting instruction is a prerequisite to a finding of harmless error when a co-conspirator's guilty plea is introduced into evidence. *See, e.g., United States* v. *Harrell,* 436 F. 2d 606, 614-16 (5th Cir. 1970); *Freije* v. *United States,* 386 F. 2d 408, 411 (1st Cir. 1967). Indeed, the courts of this State have emphasized the need for a jury instruction in this context. *See, e.g., State* v. *Costa,* 11 N. J. 239, 249 (1953); *State* v. *Felton,* 131 N. J. Super. 344, 348-350 (App. Div. 1974), certif. den. 68 N. J. 140 (1975).

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Moreover, the evidence of guilt adduced below was not so overwhelming as to compel a finding that the trial court's error was harmless beyond a reasonable doubt. The State's case was primarily circumstantial in nature. Aside from Cicala's testimony, the only direct evidence implicating defendants in the conspiracy was the testimony of co-conspirator Gerald Festa. Given Festa's extensive criminal record and his interest in the outcome of the case, the jurors might very well have doubted his veracity. Thus, there clearly exists a reasonable possibility that testimony regarding Cicala's guilty plea "led the jury to a result it otherwise might not have reached." *State* v. *Macon,* 57 N. J. 325, 336 (1971).

The majority asserts that due to Cicala's testimony concerning his dealings with Festa, "his guilty plea add[ed] little, if any, extra evidential weight to the proofs establishing the existence of a conspiracy as between himself and Festa." See *ante* at 436. The soundness of this conclusion is belied by the prosecutor's decision to stress that very guilty plea during his summation. It seems to me, as it must have to the prosecutor, that a jury is likely to be influenced to a much greater extent by the presence of a conviction than by the mere narration of events culminating in a conviction.

Accordingly, I would affirm the judgment of the Appellate Division and remand this case for a new trial.

SCHREIBER, J., concurring in the result.

For reversal and reinstatement—Chief Justice HUGHES, Justices SULLIVAN, CLIFFORD, SCHREIBER and HANDLER and Judge CONFORD—6.

For affirmance—Justice PASHMAN—1.

APPENDIX H

Opinion of the United States District Court for the District of New Jersey, Dated May 3, 1979

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil #79-301

In re: ROBERT BISACCIA,

Petitioner,

v.

THE ATTORNEY GENERAL OF NEW JERSEY,

Respondent.

LACEY, D.J.

This is a habeas corpus action commenced pursuant to 28 U.S.C. §§ 2241, 2254 on January 24, 1979. Petitioner Robert Bisaccia is presently confined at the New Jersey State Prison, serving a sentence of five to seven years on a 1974 state court conviction of conspiracy, entering with intent to steal, and larceny of goods over the value of $500 following a jury trial.

The petitioner appealed his conviction to the Appellate Division of the Superior Court of New Jersey. The petitioner's appeal was consolidated with that of co-defendants Nicholas Stefanelli and Samuel Corsaro. On March 28,

1977 the Appellate Division reversed the three convictions and remanded the matter for a new trial; the decision was based on the introduction of testimony of a co-defendant that he had pled guilty to the conspiracy charge. *State* v. *Stefanelli,* 153 N.J. Super. 452 (App. Div. 1977). The New Jersey Supreme Court granted certification on the use of the co-conspirator's guilty plea as testimony and subsequent comments by the prosecutor on the guilty plea. *State* v. *Stefanelli,* 75 N.J. 4 (1977). On January 10, 1979 the Supreme Court reversed the decision of the Appellate Division and reinstated the convictions. *State* v. *Stefanelli,* 78 N. J. 418 (1979). Although the Supreme Court found error in the trial court's use of the guilty plea, the court held that "the error did not have the clear capacity to produce an unjust result and that it had a minimal effect on the outcome of the trial." *Id.* at 437.

Petitioner contends that he is being held in custody by the State of New Jersey in violation of the United States Constitution. He argues that the New Jersey Supreme Court applied an incorrect test regarding the error of the trial court in allowing the testimony about the co-conspirator's guilty plea. The petitioner contends that the proper test is found in *Chapman* v. *California,* 386 U.S. 18, 24 (1966). In that case the Court determined that the test to use for error resulting in a denial of constitutional rights is "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. The respondent, John J. Degnan, Attorney General of New Jersey, takes the position that (1) petitioner has failed to exhaust his State remedies regarding the due process claim; (2) there was no denial of due process in the admission of a co-conspirator's guilty plea;

and (3) the New Jersey Supreme Court applied the proper standard of review because the error was not of constitutional dimension.

Exhaustion of Petitioner's State Remedies

A state prisoner seeking a writ of habeas corpus in federal court must first exhaust available state judicial remedies. 28 U.S.C. § 2254(b). *See, e.g., Picard* v. *Connor,* 404 U.S. 270, 275 (1971); *Ex parte Royall,* 117 U.S. 241 (1886). The Supreme Court has determined that it is in the interest of federal-state comity "to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971); *Fay* v. *Noia,* 372 U.S. 391, 438 (1963).

The doctrine of exhaustion requires that "the federal claim must be fairly presented to the state courts." *Picard* v. *Connor, supra,* at 275. More specifically, this demands that the state prisoner seeking a writ of habeas corpus in federal court first "present the state courts with the same claim he urges upon the federal courts." *Id.* at 276. In *Picard* v. *Connor, supra,* the Court found the exhaustion requirement was not fulfilled by the state prisoner petitioning for a writ of habeas corpus since the state court did not have "a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect," *id.,* since the prisoner did not assert an equal protection claim until his petition in the United States Supreme Court. *Id.* at 276-77; *see Zicarelli* v. *Gray,* 543 F.2d 466, 472-75 (3d Cir. 1976).

In the instant case, the petitioner claims that he was denied a "fair trial" on the basis of the admission into

evidence of a co-defendant's guilty plea and a prosecutor's subsequent comments relating to that guilty plea. The question of exhaustion arises because, according to *Picard* v. *Connor, supra*, the petitioner must raise the precise claim in the state courts before consideration may be given in federal court. In this court the petitioner claims that he was denied due process under the fourteenth amendment to the United States Constitution because the guilty plea was submitted to the jury as substantive evidence of petitioner's guilt without limiting instructions to the jury. A problem exists in petitioner's claim; while his petition alleges violations of the Constitution, he failed to allege specifically in any state court proceeding that he was denied a fair trial in violation of the federal Constitution. Indeed, the *only* "constitutional" reference the petitioner made in the state courts was that "[a]n accused is not entitled to a trial perfectly free from all error but he is entitled as a constitutional right to a fair trial and it is respectfully urged that the manner in which the court below conducted this hearing did not begin to render the defendants a fair trial." This statement, made in petitioner's brief to the Appellate Division, referred to an allegation of cumulative error, which included not only the admission of the guilty plea, but also admitting hearsay evidence and violating sixth amendment confrontation rights. In contrast, when petitioner claimed that admission of the guilty plea was error, he failed in his briefs to the Appellate Division and to the New Jersey Supreme Court to allege it in any way violated any constitutional rights. *See Brief of Defendants-Appellants to Superior Court of New Jersey, Appellate Division* at 37. No specific constitutional reference was made to the use of the guilty plea. Reliance was placed by the petitioner upon

the third circuit decision of *United States* v. *Toner,* 173 F.2d 140 (3rd Cir. 1949), in which a similar use of a guilty plea of a co-conspirator was found to deprive the petitioner of a fair trial. No mention was made, however, of a violation of the Constitution. This court has held that, to satisfy exhaustion, the Constitution must be "specifically invo[ked]." *United States ex rel. Arthur Lee Suggs* v. *Hilton,* Civil No. 77-2048 at 2 (unpublished opinion, May 24, 1978). The reason for such a rule is that

> [a] state court conviction can be overturned by a state appellate court on the basis of state common law, state statutory law, and the state constituion, as well as on the basis of the United States Constitution. Consequently, in the absence of a specific invocation of the United States Constitution, the state courts were entitled to assume that . . . grounds for reversal urged by the petitioner were based upon state law rather than federal law.

Id. Consequently, the substance of the federal constitutional claims presented to this court was not "fairly presented" to the Appellate Division or to the New Jersey Supreme Court under *Picard* v. *Connor, supra,* and *United States ex rel. Arthur Lee Suggs* v. *Hilton, supra.* Therefore, the exhaustion requirement has not been satisfied, and petitioner's claim for relief by means of a writ of habeas corpus must be denied.

Admission of the Guilty Plea of a Co-conspirator

Assuming arguendo that the petitioner has exhausted his state remedies, the court must then consider the merits of the petitioner's argument.

Appendix H

It is well settled that a state prisoner petitioning for a writ of habeas corpus "is entitled to relief only upon proving that his detention violates the fundamental liberties of the person, safeguarded against state action by the federal Constitution." *Townsend* v. *Sain,* 372 U.S. 293 (1962). Therefore, in order to grant the writ, the federal Constitution must be violated. The third circuit in *United States* v. *Toner, supra,* considered an appeal by a defendant in a war frauds case where the defendant argued on appeal that the trial court erred by pointing to the guilty plea of a co-conspirator. *Id.* at 142. On appeal, the court found that such a charge "deprived the defendant of a very substantial protection to which he was entitled." *Id.* The court reasoned that the defendant has a right to be judged on the evidence presented against him, and not that presented against another. *Id.* The appeals court, therefore, reversed. More recently, this circuit has held that guilty pleas are not admissible to demonstrate the guilt of defendants yet on trial. However, unless undue emphasis is placed upon such evidence, the admission of such evidence is not reversible error, provided that cautionary instructions are given. *United States* v. *Gullo,* 502 F.2d 759, 761 (3d Cir. 1974); *United States* v. *Newman,* 490 F.2d 139, 143 (3d Cir. 1974); *United States* v. *Restaino,* 369 F.2d 544, 545 (3d Cir. 1966). Courts focus, however, on the evidentiary value of admission of a co-conspirator's guilty plea and not on the allegation of deprivation of due process. The fifth circuit in *United States* v. *Harrell,* 436 F.2d 606 (5th Cir. 1970), reasoned that "the evidentiary purpose ordinarily to be served by proof of a co-defendant's plea of guilty is so shadowy, so insubstantial that it would be the better practice in run-of-the-mill cases to exclude such proof altogether." *Id.* at 617. On the basis of a failure

to demonstrate a *constitutional* violation by the trial court, the petitioner should be denied a writ of habeas corpus.

It is therefore unnecessary to reach the petitioner's claim that the New Jersey Supreme Court's use of the "clear error" test prescribed in *State* v. *Macon,* 57 N.J. 325 (1971), rather than the test prescribed in *Chapman* v. *California,* 386 U.S. 18 (1966), was error.

FREDERICK B. LACEY
United States District Judge

Dated: May 3, 1979

Appendix H

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 79-301

In re:

ROBERT BISACCIA,

Petitioner,

v.

THE ATTORNEY GENERAL OF NEW JERSEY,

Respondent.

ORDER

The court having read the exhibits listed below*, and having found (1) that the petitioner has failed to exhaust his state remedies and (2) that he has failed to assert a violation of the Constitution of the United States;

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* R-1 Brief on Behalf of the State of New Jersey before the Appellate Division.

R-2 Supplemental Brief and Appendix on Behalf of the State of New Jersey before the Supreme Court of New Jersey.

R-3 Brief and Appendix on Behalf of Defendants-Appellants before the Appellate Division.

R-4 Brief on Behalf of Defendants-Respondents before the Supreme Court of New Jersey.

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IT IS HEREBY ORDERED that the petition is dismissed, without costs.

There is no probable cause for appeal.

FREDERICK B. LACEY
United States District Judge

Dated: May , 1979

APPENDIX I

Order Dismissing Petition for Writ of Habeas Corpus, Dated February 6, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil 79-301

ROBERT BISACCIA,

—VS.—

THE ATTORNEY GENERAL OF NEW JERSEY,

The court having considered the submissions of the parties and having determined that the petitioner has failed to exhaust his available state remedies and furthermore, that his claim is without merit;

IT IS HEREBY ORDERED that the petition for writ of habeas corpus is dismissed in accordance with an opinion filed May 3, 1979.

FREDERICK B. LACEY
U.S.D.J.

Date: February 6, 1980

APPENDIX J

Order Denying Petition for Rehearing *En Banc*, Dated July 10, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2040

BISACCIA, ROBERT,

Appellant

vs.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges,* and SIMMONS, *District Judge.**

The petition for rehearing filed by The Attorney General of the State of New Jersey in the above entitled case having been submitted to the judges who participated in the

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* Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania, sitting by designation.

decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

A. Leon Higginbotham, Jr.
Judge

Dated: July 10, 1980

APPENDIX K

Testimony of Joseph Cicala on April 18, 1975, in Pertinent Part

Q. * * * [D]id there ever come a time when you decided that you would tell what happened to members—a member of the Essex County Prosecutor's staff?*

A. Yes.

Q. Do you recall approximately when it was that you decided what you would tell what you knew about this case to the Essex County Prosecutor's Office?

A. Yes, it was approximately September 12 of 1974.

Q. September 12 of 1974?

A. Right.

* * *

Q. Would you tell the Court and jury what promises were made to you?

A. The promises were that recommendations would be made to drop the second and third count of this indictment and the recommendations would be made to the sentencing judge at the time of my sentencing as to my cooperation in this case.

Q. So you understood at the time that you were or would be charged in a three count indictment. Is that correct?

A. That is right.

Q. And, do you know what those counts of the indictment charge you with?

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* Direct examination by Assistant Prosecutor Goldberg.

A. Yes.

Q. What are they?

A. Conspiracy, entering with intent to rob, and the other one escapes me. I don't know the other one.

Q. In any event, did there come a time when you said that you were going to plead guilty, guilty to the first count of that indictment conspiracy?

A. Yes. Yes.

Q. And the recommendation or the promise made to you was that the Prosecutor's office would recommend that the other two counts be dismissed?

A. That is correct.

Q. Did anyone promise you or tell you that the judge would give you a certain specific sentence because of any cooperation?

A. No.

Q. Did the Prosecutor or any Assistant Prosecutor or any detective or investigator tell you that they would recommend to the judge the specific sentence that they think you should have?

A. No.

* * *

Q. Mr. Cicala, do you know any of the people sitting at either of these two tables indicating the defense tables?

A. No. No.

Q. Not knowing them do you have any personal antagonism toward any of them?

A. No.

Q. Do you have any personal knowledge whether or not or how they might be involved this case?

A. No.

Q. Of your own knowledge.

A. No. No.

Q. Did you in fact plead guilty to the first count of this indictment?

A. Yes, I did.

Q. When was that?

Mr. Ford:* I am going to object.

Mr. Isles:** I object.

Mr. Ford.: I am going to have to object, your Honor, because it is my opinion that he did not plead guilty to the first count of this indictment.

The Court: I will allow the question. Your objection is overruled.

Q. Was that, Mr. Cicala—

Mr. Ford: I believe, your Honor—

The Court: Your objection is overruled. I know. I amended the indictment and this is the indictment to which he pleaded guilty. Your objection is overruled.

A. Monday of this week.

* * *

Q. Sir, I show you Indictment 75-74 and ask you to look carefully at this indictment and I am referring you specifically to the line that begin between on or about. Do you see that?***

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* Counsel for co-defendant Sperduto.

** Counsel for respondent.

*** Cross-examination by Mr. Ford, counsel for Sperduto.

A. Yes.

Q. You didn't plead to that; did you?

A. No.

Q. As a matter of fact you pleaded in this courtroom; did you not?

A. Yes, I did.

Q. And, Judge Fusco would not take your plea to the indictment as it reads here; would he?

A. No.

Q. Why wouldn't he take your plea to that indictment? Did he indicate that to you?

A. There was a time discrepancy.

Q. What was the date, sir, on which you say you had a conversation with Mr. Festa?

A. June of '71.

• • •

Q. There is absolutely no question in your mind whatsoever; is there, sir, that you spoke to Mr. Festa about this Bruno house in June of 1971.

A. That was the first talk of it yes.

Q. And the second talk of it was approximately when?

A. Approximately a couple of weeks later.

• • •

Q. Between June or July of '71 and August of 1972 did you ever have any conversations with any of these defendants?

A. No.

Q. Did you ever have any meeting with any of these defendants?

A. No.

Q. Your own observations from your own knowledge—do you know of any meetings or anything

else in which they were involved in this period of time?

A. With myself?

Q. Yes.

Q. No.

• • •

Q. When you entered this plea you entered it before Judge Fusco. Is that correct?

A. That is right.

Q. Didn't he question you at the time that you entered the plea?

A. Yes, he did.

Q. And, at that time did you indicate to him that your conspiracy involving the Bruno house was just with Gerard Festa?

A. Yes.

Q. Did you make any statement at the time you entered the plea to Indictment 75-74 as to how many you conspired with?

A. Yes, I did.

Q. Who was that?

A. Gerard Festa.

• • •

Mr. Ford: I have no further questions.

Mr. Checki:* No questions.

Mr. Isles: No questions.

• • •

Mr. Grossman:** I have no questions.

Mr. O'Brien:*** No questions of this witness.

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* Counsel for co-defendant Stefanelli.

** Counsel for co-defendant Tosi.

*** Counsel for co-defendant Corsaro.

Appendix K

The Court: I thank you, Prosecutor, anything else?

Mr. Goldberg: No, your Honor.

The Court: Thank you. You may step down, Mr. Cicala.

[3T129-1 to 10; 3T130-18 to 131-14; 3T132-4 to 10; 3T133-9 to 134-11; 3T138-2 to 15, 20 to 22; 3T139-15 to 21; 3T142-11 to 20; 3T151-11 to 18; 3T151-24 to 152-2; 3T155-10 to 13, 17 to 22].

APPENDIX L

Constitutional Provisions, Statutes, Court and Evidence Rules Involved

Constitution of the United States, Amendment XIV, Section 1:

> Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. §1254(1):

> §1254. Courts of appeals; certiorari; appeal; certified questions

Appendix L

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §2241(a), (c)(3):

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *

28 U.S.C. §2254 (b), (c):

§2254. State custody; remedies in Federal courts

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Constitution of the State of New Jersey, Article 1, paragraph 10:

In all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

N.J.S.A. 2A:94-1:

2A:94-1. Breaking and entering or entering

Any person who willfully or maliciously breaks and enters, or enters without breaking, any building, structure, room, ship, vessel, car, vehicle or airplane, with intent to kill, kidnap, rob, steal, commit rape, mayhem or battery, is guilty of a high misdemeanor.

N.J.S.A. 2A:98-1:

2A:98-1. Conspiracy

Any 2 or more persons who conspire:

a. To commit a crime; or

b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or

c. Falsely to institute and maintain any suit; or

d. To cheat and defraud a person of any property by any means which are in themselves criminal; or

e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or

f. To obtain money by false pretenses; or

g. To conceal or spread any contagious disease; or

h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

N.J.S.A. 2A:119-2:

2A:119-2. Stealing money, chattels and other articles, property and things

Any person who:

a. Steals any money, goods, chattels or other personal property of another; or

b. Digs, pulls, pulls up, picks, gathers, breaks, rips, cuts, severs, roots up, or otherwise destroys or damages, carries away or unlawfully appro-

priates with intent to steal, any real or personal property, or any part thereof;

c. Willfully kills any animal with intent to steal it or any part thereof, the property of another—

Is guilty of a misdemeanor, if the price or value of such property is in excess of $200.00, and under $500.00 and if the price or value thereof be $500.00 or over such person is guilty of a high misdemeanor.

New Jersey Court Rules, R. 2:10-2:

2:10-2. Notice of Trial Errors

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

New Jersey Court Rules, R. 3:9-2*:

3:9-2. Pleas

A defendant may plead only non vult or not guilty to an indictment for a crime punishable by death. As to all other offenses the defendant may plead only guilty or not guilty. The court in its discretion may refuse to accept a plea of non vult, or guilty, and shall not accept such plea without first addressing the defendant personally and determining by inquiry

* As in effect on April 14, 1975, the date of Joseph Cicala's guilty plea.

of the defendant and others, in the court's discretion, that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea. For good causes shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding. If a plea of guilty is refused, no admission made by the defendant shall be admissible in evidence against him at the trial. If a defendant refuses to plead or stands mute, or if the court refuses to accept a plea of guilty, a plea of not guilty shall be entered. Before accepting a plea of guilty the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts, which shall then be filed with the clerk of the court.

New Jersey Court Rules, R. 3:22-4:

3:22-4. Bar of Grounds Not Raised in Prior Proceedings; Exceptions

Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that

denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

New Jersey Evidence Rules, R. 20*:

Rule 20. Evidence Generally Affecting Credibility

Except as otherwise provided by Rules 22 and 47, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence relevant upon the issue of credibility, except that the party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised. No evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony.

* As in effect in 1975, at the time of respondent's trial.